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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED

1. Whether an instruction which allowed a jury to find a "*willful violation*" of the Age Discrimination in Employment Act (ADEA) if the employer "either knew of reasonably should have known that its action was in violation of the law", is consistent with the *"knowing or reckless disregard"* standard for willfulness approved by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985)?*

2. Whether undisputed evidence, including the employee's admission, that bad economic conditions justified a companywide reduction in force (terminating plaintiff's job for which no replacement was hired), could be considered "pretextual" in an ADEA case?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

PLITT THEATRES, INC. is a corporation of the State of Delaware. During the pendency of proceedings in the U.S. District Court, PLITT became a wholly owned subsidiary of Cineplex Odeon Corporation, a corporation of Ontario, Canada. Cineplex Odeon Corporation is a publicly held corporation whose stock is traded on Canadian Stock Exchanges.

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* An identical issue is pending before this Court on Petition for Writ of Certiorari in No. 87-761, *WCLR Radio Station, Petitioner v. Leo J. Rengers, Respondent.*

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No.

In The

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October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Plitt Theatres, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

REFERENCE TO REPORTS

The opinion of the Court of Appeals is reported at 831 F.2d 1321, and is appended hereto as App. A, 1a-33a. The order of the Seventh Circuit denying Petition for Rehearing *en banc*, entered October 28, 1987, is appended hereto as Appendix B, 35a). The order of the Seventh Circuit denying petitioner's motion to recall mandate is appended hereto as Appendix C, 36a. The order of the District Court denying in part and granting in part plaintiff's post-trial motions is appended hereto as App. D. The order denying defendant's post-trial motion is appended hereto as App. E. 50a.

JURISDICTION

The judgment of the Court of Appeals (App. A, 34a) was entered on September 23, 1987. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

Section 7(b) of the Age Discrimination in Employment Act of 1967 (29 USC § 626(b)), in pertinent part provides:

> Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC §§ 216, 217): *Provided* That liquidated damages shall be payable only in cases of willful violations of this Act.

Section 16(b) of the Fair Labor Standards Act of 1938, 29 USC § 216(b) provides in pertinent part:

> Any employer who violates the provisions of section 6 or section 7 of this Act (29 USC §§ 206 or 207) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages.

STATEMENT OF THE CASE

Pursuant to Section 7(b) of the ADEA, above-quoted, an employee who proves a "willful violation" of the Act is entitled to a punitive award of double (or "liquidated") damages. Prior to this Court's decision in *Trans World Airlines Inc.* v. *Thurston*, 469 US 111, 126 (1985) (hereafter "Thurston")) the courts of appeals for the various circuits adopted varying definitions of "willful".

The Seventh Circuit, in *Sywock* v. *Milwaukee Boiler Mfg.* Co., 665 F. 2d 149 (7th Cir. 1980), relying on the test posited in *Wehr* v. *Burroughs Corp.*, 619 F2d 276, 280 (3d Cir. 1980), held that the requirement of willfulness was met if the employer simply "knew or reasonably should have known" that its actions violated the ADEA.

In the instant case the trial court gave a *Sywock* instruction. (App. A, 8a). While the case was pending on defendant's post-trial motion,[1] this Court decided the seminal case of *Thurston* which approved a far stricter standard of willfulness than the "knew-or-should-have-known" criterion, and approved the Second Circuit's definition that a violation of the ADEA was "willful" for the purposes of punitive damages if "the employer knew or *showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA*". (*Thurston*, 469 US at 129, 105 S. Ct. at 625). (Emphasis added)

Neither the trial court nor the Court of Appeals saw fit to disturb the jury verdict in favor of respondent. The Seventh Circuit, citing two recent decisions of that court, *Rengers* v. *WCLR Radio Station*, 825 F. 2d 160 (7th Cir. Aug. 1987) (*Pet for cert* pending 87-761), and *Graefenhain* v. *Pabst Brewing Co.*, 827 F. 2d 13 (7th Cir. June 1987),

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[1] The Court of Appeals is mistaken in asserting:

> After the defendant filed its notice of appeal in this action the Supreme Court decided [Thurston]. (App. 8a).

held that the "willful" test in *Syvock* "*is consistent with the standard in Thurston*" (App. A, 9a) and that the "*Syvock* instruction as interpreted in *Rengers* and the instant opinion is in accord with the analysis of the ADEA provided in *Thurston*". (App. A, 9a). (Emphasis added)

The majority opinion states:

> While it is certainly true that an instruction of willfulness under the 'reckless disregard' language approved in *Thurston would also have been appropriate*, *Graefenhain* (supra) holds that the *Syvock* instruction is also sufficient under *Thurston*. The trial court therefore did not err in instructing the jury via the *Syvock* definition of willfulness. (App. A, 10a) (Emphasis added).

Judge Manion's "concurring opinion"[2] notes:

> The Seventh Circuit appears to stand alone in applying a less stringent standard than the 'knew or showed reckless disregard" standard found to be acceptable by the Supreme Court in *Thurston*.
>
> *Syvock's* 'should have known' standard and *Thurston's* 'reckless disregard' standard *cannot peacefully co-exist*. *Syvock* only requires negligence as a threshold for finding willfulness; *Thurston* requires recklessness. The law has always made a large distinction between negligence and reckless conduct, particularly regarding the award of punitive damages. (App. A, 31a) (Emphasis added).

Following *Thurston* every circuit, except the Seventh, has conformed its standard of willfulness under the ADEA

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[2] Because of the two then unreported Seventh Circuit decisions, *Graefenhain*, supra and *Rengers* supra, upholding the validity of the *Syvock* "knew or should have known" test of willfulness, notwithstanding *Thurston*, Judge Manion felt constrained to accept *Graefenhain* and *Rengers* as controlling precedents, and therefore describes his opinion as "concurring in part". In actuality the opinion *dissents* from the majority and sharply challenges the Seventh Circuit's "application of *Thurston*". (App. A, 30a).

to the teachings of this Court. Because of the blatant inconsistency between *Thurston* and the less severe test in *Syvock*, which the Seventh Circuit persists in retaining, Petitioner respectfully seeks review of that issue.

STATEMENT OF FACTS

Petitioner, Plitt Theatres, Inc. (hereafter "Plitt") operated a national chain of movie theaters. In 1978 Respondent Sam T. Coston, was hired at age 55 by Plitt as a "District Manager in its Midwest Division". He was responsible for general operation of a group of movie theaters. A year later, Coston was promoted to Operations Manager, a post "recreated for him", enlarging his territory and salary. (App. A, 2a, tr. 25, 58, 171, 320).

Coston reported to Vice President Irwin Cohen, who in turn reported to Executive Vice President Harold Klein (10 years older than Coston), who was Plitt's "Chief Official" for its Midwest Region, (App. A, 2a)

Sometime in late 1981, prior to Christmas and New Years, business conditions in the movie industry had turned "extremely bad" at a time when pre-holiday theater business is usually brisk. Plitt management determined to make a "companywide" reduction in personnel, including elimination of Coston's position as Operations Manager and assigning his District Manager duties to other District Managers although younger than Coston, but having seniority. (Tr. 31, 45, 116, 222).

Klein instructed Cohen, in the chain of command, to notify Coston of his termination (Tr. 33, 45 46). On January 4, 1982, in Cohen's office, with only Cohen and Coston present, Cohen informed plaintiff about the "various cutbacks" in Plitt, that Coston's position of Operations Manager was being "phased out" and that plaintiff was being terminated as of January 8, 1982 (Tr. 153, 165). At that time Coston was about 59 years old. (Tr. 159, 398).

Coston acknowledged that he was as aware as anyone in Plitt of the poor business conditions, (App. A, 5a) that he had "no argument" with the elimination of the Operations Manager position (which was never refilled) and that he "was not surprised that certain things had to be done". (App. A, 3a, Tr. 153). Coston then asked Cohen if he could continue as District Manager in place of one of the younger district managers. According to Coston, Cohen answered that one of them, Burns, had seniority with Plitt and that the other, Noack, was "super". (Tr. 153, 203, App. A, 3a).

Coston then asked Cohen if there was any position for him in the entire Plitt organization. Cohen told him there was none. Coston testified:

> After a few seconds' hesitation, he said to me, 'Besides, Sam, we have to go with youth'. (Tr. 154)

Coston inquired if Harold Klein knew of "my firing", and was told that Klein did know. (Tr. 154) (Indeed Klein had instructed Cohen to discharge Coston in the reduction in force.)

In a farewell meeting with Klein on January 8, 1982, Coston admitted that he did not tell Klein about Cohen's offhand "we-have-to-go-with-youth" remark because, "I knew he wouldn't believe me; and ... I didn't want to jeopardize my termination pay". (Tr. 205).

According to Cohen, the subject of Coston's age never came up in the conversation in which he discharged Coston. Cohen testified he did not even know plaintiff's age until after the ADEA lawsuit. Klein had not instructed Cohen to terminate Coston because of his age and Coston's age was not a factor in the discharge. Cohen pointed out that in January 1982 one of the five remaining District Managers (Kronradt) was older than Coston and two others were in the "protected" age group under the ADEA. (Tr. 167, 223, 225, 246-247). No one replaced Respondent as Operation Manager or as a District Manager. (Tr. 174, 202, 247).

Respondent filed a claim under the ADEA with the Equal Employment Opportunity commission. On being informed that the EEOC would take no action on his charge of age discrimination, Coston brought this action against Plitt in the federal district court. The case was tried to a jury which was asked to "fix the amount of money which will reasonably and fairly compensate [plaintiff] for lost income in the form of commissions and bonuses." (Tr. 394). The jury returned a verdict of $9,600. Pursuant to Section 626(b), Respondent requested reinstatement or frontpay, liquidated damages, actual damages, interest, costs and attorney's fees. The district judge denied both reinstatement and frontpay, computed Respondent's total pecuniary damages, and calculated the "liquidated damages" by first doubling Respondent's actual damages, then deducting the amounts earned in mitigation. The court awarded Respondent "liquidated damages" of $109,433.40, and granted attorney's fees to plaintiff's counsel in the sum of $35,408.50 (App. A, 3a-4a). (App. D, 9a)

The trial court denied Petitioner's post-trial motion for judgment n.o.v. or alternatively for a new trial. (App. E, 50a, 57a)

Both the district court and the court of appeals found that plaintiff sufficiently proved a prima facie case of age discrimination because, "at the time Irwin Cohen told the plaintiff that Plitt was firing the plaintiff, Cohen added that 'Plitt is going with youth". (App. A, 5a, 7a).[3]

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[3] Although it was Klein's decision to terminate Respondent because of the adverse business conditions, the offhand remark was made by Cohen, who was not the decisionmaker. Cohen's authority was limited to informing plaintiff of his discharge. Cohen's remark could hardly be an "admission" binding of Plitt. There is no evidence of a "nexus" between Cohen's isolated comment and Klein's authorization to discharge Respondent. Until the instant case it was the law in the Seventh Circuit and else-

(Footnote continued on the following page)

Over petitioner's objection that the *Syvock* instruction, which the trial judge agreed to give, equated "wilfulness" with mere negligence and that mere knowledge by petitioner that it was aware of the age discrimination statute would not amount to a willful discharge because of Respondent's age, the Court nevertheless instructed the jury:

> In order for the discrimination by the Defendant to have been willful, the Defendant's actions must have been knowing and voluntary and the Defendant either knew or reasonably should have known that its action were in violation of the law. (App. A, 8a).

During its deliberation the jury sent a written interrogatory to the trial judge:

> Your Honor,
>
> If age discrimination is found, and the stipulations state that the defendants are aware of the age discrimination statutes, what conditions would justify a finding of "not willful" discrimination?

The trial court did not respond to the interrogatory and the jury resumed its deliberation without an answer from the Court.

The Court of Appeals affirmed the giving of the *Syvock* instruction notwithstanding the apparent inconsistency with the more stringent "reckless disregard" standard postulated in *Thurston*. The Court of Appeals ignores the circumstance that even the lay jury was puzzled as to how mere knowledge by the employer of the ADEA could support a finding of a willful violation. The Seventh Circuit's rationale for retaining *Syvock*, is contained in its "reason-

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3 *(Continued)*
where that under the ADEA it is the one who makes the firing decision that is important, not who implements it. *LaMontagne* v. *American Convenience Products Inc.*, 750 F.2d 1405 (7th Cir. 1984)' *McNeil* v. *Economic Laboratory, Inc.*, 800 F.2d 111 (7th Cir. 1986).

ableness" test because:

> Where the meaning the ADEA is debatable, an employer's *reasonable* and good faith construction of the statute's requirements even if erroneous, cannot be considered willful. In the case at bar . . . no debatable requirement of ADEA was at issue. Therefore, there is no possibility that Plitt's action was a *reasonable* construction of an ambiguous provision of the ADEA. (App. A, 10a) (Emphasis added).

The Court of Appeals did agree with Petitioner that the trial court erred in the calculation of liquidated damages, and cited *Fariss* v. *Lynchburg Foundry*, 769 F. 2d 958 (4th Cir. 1985) which holds that amounts earned in mitigation of backpay (i.e., an employee's pecuniary loss) should be deducted before, rather than after doubling the award. (App. A, 12a-15a).)

The Court of Appeals responded to Petitioner's contention that reduction in force ("RIF") situations are special in nature under the ADEA in that the employee is required to prove as an additional element of a prima face case "that the employer *intended to discriminate* in making the employment decision". *(Matthews* v. *Allis Chalmers*, 769 F. 2d 1215, 1217 (7th Cir. 1985); *Williams* v. *General Motors Corp.*, 656 F. 2d 120, 128-29 (5th Cir. 1981) cert. den'd. 455 U.S. 943: *Dorsch* v. *L. B. Foster Co.*, 782 F. 2d 1421, 1424 (7th Cir. 1986)). The Court in the instant case ruled that the same *Syvock* quantum of evidence supporting a finding of willfulness, in effect, was sufficient to satisfy the element of intention to discriminate in the RIF situation. (App. A, 5a). This Court has not yet reviewed the elements requisite to establish a prima facie case under the ADEA in a reduction in force situation.

REASONS FOR GRANTING THE PETITION

1. Prior to *Thurston* there existed in the various courts of appeals a conflict and crazy-quilt pattern regarding the proper formulation of the "willfulness" standard

under Sec. 7(b) of the ADEA. *Cf Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F. 2d 149, 156 (7th Cir. 1981); *Wehr* v. *Burroughs Corp.*, 619 F. 2d 276, 280 (3d Cir. 1980) and *Airline Pilots Assn.* v. *Trans World Airlines*, 713 F. 2d 940, 956 (2d Cir. 1983) aff'd and rev'd in part 469 U.S. 926 (1985). After *Thurston*, every other circuit except the Seventh has revised its ADEA concept of willfulness to comport the *Thurston* test of "knew or showed reckless disregard". See cases cited in Manion's opinion. (App. A, 31a).

2. In the Third Circuit not only did the Court abandon its previous test of simple negligence postulated in *Weher*, supra, upon which *Syvock* was modeled, but held, post-*Thurston*, that in individual "disparate treatment cases" under ADEA a tougher standard than mere knowledge, such as intentional or "outrageous" conduct was required to support a doubling or punitive award. *Dreyer* v. *Arco Chemical Co.*, 801 F. 2d 651 (3rd 1986). *cert. den'd* 107 S. Ct. 1348 (1987).

3. Only the Seventh Circuit in the instant case and its recent decisions *Graefenhain*, supra, and *Rengers*, supra, has insisted upon adhering to its pre-*Thurston* less severe measure of willfulness and has offered the dubious rationale that the two manifestly inconsistent standards can "co-exist".[4]

4. Because all other circuits which prior to *Thurston* had applied a simple negligence test for willfulness, have

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[4] Not only was the Seventh Circuit's adherence to *Syvock* inconsistent with *Thurston* and the other circuits, the majority in the instant case overlooks its own post-*Thurston* precedent in *Walton* v. *United Consumer Club Inc.*, 786 F. 2d 303 (7th Cir. 1986) an FSLA case involving an analogous question as to whether the employer there had willfully violated that Act. In *Walton* the court said:

> We therefore agree with the courts that have held that 'willful' means the same thing throughout the ADEA and FSLA [citation]. *Thurston* supplies one definition of 'willful' for both. (786 F. 2d at 311). See ftn 6 post.

changed course after *Thurston*, the retention of *Syvock* by the Seventh Circuit presents not only an intolerable discrepancy with a decision of this Court, but isolates the Seventh Circuit as a "minority of one". As Judge Manion's "concurring" opinion notes:

> [T]he Seventh Circuit . . . appears to stand alone in applying a less stringent standard than the 'knew or showed reckless disregard' standard found to be acceptable by the Supreme Court in *Thurston*. (App. A, 31a).

5. Judge Manion's opinion persuasively points out that the precedents of *Grefenhain* and *Rengers supra*, upon which the majority relies in its persistence that *Syvock* is still good law:

> . . . need our re-examination in light of the discrepancy between the standards presented in *Thurston* and *Syvock*. If we do not reconcile that discrepancy we will create unnecessary confusion throughout the circuit on the proper definition of willful violation of the ADEA. (App. A, 32-33a).

6. The first level of the "two tier liability" scheme structured by Congress in the ADEA (*Thurston*) can be satisfied by a showing of an employer's knowledge of the Act and that age was a motivating factor in the employee's discharge. The second level to support a punitive award, requires a higher degree of culpability. Otherwise an "automatic" doubling of damages will result from a mere violation of the Act. (*Dreyer* v. *ARCO Chemical Co.*, 801 F. 2d 51, 656-67) (3d Cir. 1986)) *cert. denied.* Obliteration of this fundamental distinction by the Seventh Circuit and its diluted interpretation of *Thurston* is why this Court should grant a Writ of Certiorari to re-affirm, clarify and effectuate the intent of Congress in creating the "two-tiered liability scheme". (*Thurston*, 469 U.S. at 123).

I.

CERTIORARI SHOULD BE GRANTED TO BRING THE SEVENTH CIRCUIT IN LINE WITH *THURSTON* AND THE INTENT OF CONGRESS IN CREATING A BI-LEVEL STRUCTURE OF LIABILITY UNDER THE ADEA.

A. The definition of "willfulness" adhered to by the Seventh Circuit conflicts with the standard approved by this Court in *Thurston* and its retention will generate confusion in ADEA cases.

The majority in the instant Seventh Circuit opinion holds that its criterion for a "wilfull" violation of the ADEA, as expressed in *Syvock* [supra] and re-asserted in that circuit's recent cases *Graefenhain* [supra] and *Rengers* [supra], is still viable and "consistent with the standard announced in *Thurston*"; and that "an instruction of willfulness under the 'reckless disregard' language approved in *Thurston* would have *also been appropriate*". (App. A, 9a) (Emphasis added).

Syvock and *Thurston cannot both* be appropriate. The "knew-or-should-have-known" standard of *Syvock* – which is the test of simple negligence, not willfulness – was clearly rejected by this Court in *Thurston* in favor of language more denotative of willfulness.

Judge Manion's concurring/dissenting opinion aptly notes:

> The Seventh Circuit appears to stand alone in applying a less stringent standard than the 'knew or showed reckless disregard" standard found to be acceptable by the Supreme Court in *Thurston*.
>
> *Syvock's* 'should have known' standard and *Thurston's* 'reckless disregard' standard *cannot peacefully co-exist*. *Syvock* only requires negligence as a threshold for finding willfulness; *Thurston* requires recklessness. The law has always made a large distinction between negli-

> gence and reckless conduct, particularly regarding the award of punitive damages. (App. A, 31a).

Judge Manion is also unassailably correct in highlighting the conflict between *Syvock* and *Thurston*:

> Given that *Thurston* states that the award of liquidated damages is punitive in nature, (See 469 U.S. at 125), *Syvock's* 'should have known' standard *does not square* with either the language or the rationale of *Thurston* (App. A, 31a-32a) (emphasis added).

It is true that in *Thurston* the Court noted that the Second Circuit's "knowing or reckless disregard" standard, "is an acceptable way to articulate a definition of 'willfull' ". (469 U.S. at 126-128). In context the Court discussed various other ways to express the standard of liability based on intentional or reckless conduct in formulating the test for wilfullness. Certainly, however, the various formulations did not include – indeed excluded – the *Syvock* test of mere negligence.[1]

In *Thurston*, this Court declared its purpose of deciding what constitutes a " 'willful' violation of the ADEA entitling a plaintiff to 'liquidate' or double damages". (469 U.S. at 120). The Court decided that question. The Court extensively reviewed the legislative history of the ADEA (469 US 120-121, 126-128), examined the standard of willfulness applied in connection with other criminal and civil statutes (*id* at 126-127) and probed for the Congressional

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[1] In *Brock* v. *Richland Shoe Co.*, No. 86-1520, this Court granted certiorari on October 5, 1987 to review the question whether the *Thurston* standard of willfulness applies in the context of the three-year statute of limitations under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 255(s). The Solicitor General has argued to the Court that the willfulness requirement under the ADEA should be interpreted consistently with the FLSA statute of limitations and has urged the Court to adopt a "reasonableness" test adopted by the Seventh Circuit, citing *Syvock*. (Gov't's Pet. for Writ of Cetiorari, No. 86-1520, p. 17-18

intent underlying ADEA's provision for damages. (*id* at 125-126, 128). Manifestly, the Court thereby undertook to articulate a test of willfulness which could be uniformly applied in all the lower courts in the federal system.

In the instant case Judge Manion is persuasively correct in predicting that retention of the *Syvock* criterion, along with the obligation to follow *Thurston*, will generate confusion in future ADEA cases. Predictably a trial judge will be perplexed in having to choose between a *Syvock* and a *Thurston* type instruction (respectively submitted by an employee/plaintiff and employer/defendant), and most certainly a jury will be confused, if both instructions are given. (App. A, 32a).

It is notable that every other circuit which previously embraced a *Syvock*-type of instruction has taken *Thurston* to heart in formulating the test for ADEA willfulness, and to conform to *Thurston's* strictures. (See: *Dreyer* v. *ARCO Chemical Co.*, 801 F. 2d 651 (3d Cir. 1986) and other cases cited by Judge Manion in App. A, 31a. *Thurston* is the drummer to which all courts of appeals and district courts should march. But the Seventh Circuit chooses to march to a different drummer – even though it has declared that *Thurston* "must be" followed *Kossman* v. *Calumet County*, 800 F. 2d 697, 701 (7th Cir. 1986).

Because all other circuits which have applied the pre-*Thurston* test of willfulness have changed course, the retention of *Syvock* by the Seventh Circuit presents not only an intolerable discrepancy with the decision of this Court, but isolates the Seventh Circuit as a minority of one. (App. A, 31a).

The Congressional usage of "liquidated damages" to mean "punitive damages" was not felicitous. Nevertheless, whatever doubt previously existed as to the concept of "liquidated damages under the ADEA", this Court in *Thurston* emphasized that Congress intended for liquidated damages to be punitive in nature". (469 US at 126). Hence, it is not

true, as the Court of Appeals in the instant case assumed, that punitive damages are "appropriate" on a showing that an employer violates the Act simply because he discharges an employee in the protected age group when the employer is aware of the existence of the statute, and the employee's age is *a* factor in the termination. The quantum of evidence sufficient to support an award of compensatory damages is not the same quantum necessary for a punitive award. Otherwise, the "two tier scheme of liability" contemplated by Congress is obliterated – notwithstanding the Supreme Court's disclaimer.

If indeed, "liquidated damages" under the Act are "punitive in nature", then such a punishment is appropriate only where an employer knowingly "intended to violate the act" or " 'wholly disregards the law' ". (*Thurston*, 469 US at 126, n 19 quoting *Nabob Oil Co.* v. *United States*, 190 F 2d 478, 479 (10th Cir. 1951) *cert. den'd.* 342 U.S. 876 (1951)). The *Thurston* standard of willfulness, but not the Seventh Circuit's, is consistent with the commonly understood concept of punitive damages. (Restatement (Second) of Torts, § 908(2), 1977 (in which punitive damages may be awarded because of a defendant's "evil motive" or his reckless indifference to the rights of others).

B. The Seventh Circuit's lenient and liberal standard for awarding punitive damages offends the "two-tiered" liability scheme established by Congress, preserved in *Thurston*

Especially noting the "two-tiered liability scheme" contemplated by Congress in the ADEA, *Thurston* also posited a bi-level test for awarding damages for a violation of the Act. If a jury finds the requisite elements for an age-discriminatory discharge of an employee pursuant to *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) *LaMontagne* v. *American Convenience Products Inc.*, 750 F. 2d 1405 (7th Cir. 1984) the "knew or reason-

ably should have known" criterion will support an award of "unpaid minimum wages or unpaid overtime compensation". (29 U.S.C. § 626(b). Standing alone such evidence may satisfy the first tier of liability, but is hardly sufficient to establish a "willful violation" for purposes of liquidated damages under the second tier. As the court in *Dreyer*, supra, aptly asserted:

> Because *Thurston* makes clear that we must interpret the liquidated damages provision in a way that would not permit 'an award of double damages in almost every case' . . . we must seek a standard for willfulness that distinguishes between a violation, which is almost always intentional, and a *willful violation* leading to double damages. (801 F. 2d at 657) (Emphasis added).

The majority in the instant case recognizes that the *Syvock* standard does not allow a factfinder to determine that a violation of the ADEA was willful if the employer merely knew that the ADEA was 'in the picture' ". (App. A, 10a). The majority acknowledges that *Thurston* rejected the "in-the-picture" test as inappropriate for determining willfulness and punitive awards because, "it would allow the recovery of liquidated damages even if the employer acted reasonably and in complete good faith, *Thurston*, 106 S. Ct. at 625". (*id*).

The Court then purports to reconcile *Syvock* with *Thurston* via *Regners* with the following rationale:

> [I]f an employer reasonably should have known that its actions were illegal, then the employer was not acting reasonably. (App. A, 10a).

On the other hand, according to the Seventh Circuit, "where the meaning of the ADEA is *debatable*, an employer's reasonable and good faith construction of the statute's requirements, even if erroneous, cannot be considered willful." (*id*). (Emphasis added).

The foregoing is a misreading of the *Thurston* test and a narrow perch on which to rest the viability of *Syvock*

and its "knew or reasonably should have known" standard in the light of *Thurston's* "reckless disregard" criterion. An employer's unreasonable construction even of a non-debatable aspect of the ADEA may amount to negligence, not necessarily willfulness. "Reasonableness" is the quintessential standard for negligence under the familiar "reasonable man" theory.

But, more revealing of the error lurking in the Seventh Circuit's "debatable" test is that what is "debatable" as to the meaning or operation of the ADEA is hardly appropriate for the jury which is not equipped to determine what is "debatable" in the construction of the ADEA (or any other statute). But a jury certainly is qualified to determine whether, in the discharge of an employee in the protected age group, the ADEA was violated "intentionally to discriminate", "willfuly", "with reckless disregard for the law", "maliciously", "outrageously", or "even with gross negligence". See *Dreyer* v. *ARCO Chemical Co.*, 801 F. 2d 651 (3d Cir. 1986).[2]

The *Syvock* construction which the Seventh Circuit approved in the instant case, notwithstanding *Thurston*, and in affirming punitive liability simply because the employer knew the ADEA existed, "leaves an unacceptably high risk that the jury will [almost always] impose liquidated damages simply because the employer knew the ADEA existed." (*Manion*, App. A, 32a). Hence, "absent the adoption of a novel theory that recklessness and negli-

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[2] In *Walton* v. *United Consumer Club, Inc.*, 786 F. 2d 303 (7th Cir. 1986) the Court noted that this Court in *Thurston* held that:

> . . . 'willful' means 'reckless disregard' for the law and an indifference to its requirements . . . Willfulness . . . denote[s] a range of culpability form gross negligence to actual knowledge plus malice . . . Usually it denotes some highly culpable mental state either actual knowledge that one's acts violates the law, or reckless indifference to the law. (786 F. 2d at 308).

gence are indistinguishable" the conflict between the rule in the instant case and *Thurston* cannot be justified nor tolerated. (App. A, 32a).

II.

ADVERSE BUSINESS CONDITIONS ACKNOWLEDGED BY AN EMPLOYEE, PROMPTING A COMPANYWIDE REDUCTION IN FORCE AND ABOLITION OF AN EMPLOYEE'S POSITION, CANNOT, AS A MATTER OF LAW, BE "PRETEXTUAL".

The elements of a prima facie case for age-in-employment-discrimination are a showing that (1) the employee is in the "protected class", (2) that he was performing his job satisfactorily, (3) that he was nevertheless discharged, and (4) that the employer hired a replacement. Proof of such elements raises a presumption of discrimination but the presumption is rebutted by evidence of legitimate reasons for the discharge. The burden is then on plaintiff to establish that the proffered reasons are "pretextual". *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *LaMontagne* v. *American Convenience Products Inc.*, 750 F. 2d 1405 (7th Cir. 1984).

In the case of a reduction in force situation, several courts of appeals have enunciated a fifth requirement:

> . . . producing circumstantial or direct evidence from which a factfinder might reasonably conclude that the employer *intended to discriminate* in making the employment decision in issue. (*Williams* v. *General Motors Corp.*, 656 F. 2d 120, 128-129, cert. den'd. 455 U.S. 943; *Matthews* v. *Allis Chalmers*, 769 F. 2d 1215, 1217 (7th Cir. 1985); *Dorsch* v. *L. B. Foster Co.*, 782 F. 2d 1421, 1424 (7th Cir. 1986)).

In the case at bar, by the uncontradicted evidence, plaintiff failed to prove the fifth element and did not, as a matter of law, establish that the abolition of his position

for which no replacement was hired, was "pretextual".

Respondents acknowledged that in the latter half of 1981 through the Christmas season of that year, business conditions declined drastically and prompted a company-wide reduction in force. (Tr. 195-196, 200). Hence, the primary, nondiscriminatory reason for terminating Respondent was economic retrenchment. Indeed, the trial judge himself, in denying Respondent's motion for reinstatement declared:

> Additionally, evidence indicates that at the time of plaintiff's discharge defendant was undergoing a program of retrenchment due to poor economic conditions in the movie industry. The position of Operations Manager was eliminated entirely. Furthermore, no new District Manager was hired to replace plaintiff. Plaintiff's duties as District Manager were assumed by all of the remaining District Managers. (App. D, 39a).

In these circumstances, it was anomalous for the Seventh Circuit to affirm the judgment in favor of Respondent on the ground that a "factfinder might reasonably conclude that the employer *intended to discriminate in making the employment decision* [i.e., reduction in force]" (App. A, 3a). (Emphasis added).

The total evidence of "age discrimination" in the instant case is concentrated on the last conversation between Coston and Cohen on January 4, 1982. (Tr. 153, 195). Coston understood and agreed that bad business conditions in the movie industry prompted the reduction of force of various personnel including himself. (App. A, 5a). When Respondent asked Cohen why he could not remain as a District Manager in place of two younger District Mangers, Burns and Noack, he was told, "Pat Burns has seniority and Kurt Noack was super." (Tr. 153, 203). When Coston then asked if there was any position for him in the entire Plitt organization, Cohen said there was none and then:

> After a few seconds' hesitation he said to me, 'Besides, Sam, we have to go with youth.' (Tr. 154).

Paradoxically the Seventh Circuit splits the credential weight of Cohen's response to Respondent's query: on the one hand the Court declared that with reference to the retention of the younger District Managers because of seniority or "super" performance, the jury was entitled to reject those explanations "as pretextual", i.e. as false. (App. A, 6a).

On the other hand, in the same context, Cohen's purely offhand remark "We-have-to-go-with-youth" is accepted not only as worthy of credence, but, worse, as if it were Plitt's employment policy.[3]

To accept one portion of Cohen's remark as true, rejecting another remark made in the same context as "pretextual" is unsupported. Since the ADEA "was not intended as a vehicle for judicial review of business decisions" (*Kephart* v. *Institute of Gas Technology*, 630 F. 2d 1217 (7th Cir. 1980) the retention of younger District Managers over Respondent should not have been reviewed by the courts below.

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[3] The uncontested evidence was that Petitioner had a very liberal and enlightened policy toward elderly employees throughout the organization and indeed, retained District Manager personnel older than Respondent. (Tr. 8, 244, 289).

CONCLUSION

For the foregoing reasons Petitioner respectfully prays that this PETITION FOR WRIT OF CERTIORARI be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 86-2109, 86-2137, 86-2144

SAM T. COSTON,

Plaintiff-Appellee,

v.

PLITT THEATRES, INC.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 618—**Stanley J. Roszkowski**, *Judge*.

ARGUED FEBRUARY 10, 1987—DECIDED SEPTEMBER 23, 1987

Before COFFEY and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

ESCHBACH, *Senior Circuit Judge*. Sam T. Coston was discharged from his position as Operations Manager of Plitt Theatres, Inc. ("Plitt"), and brought an action under the Age Discrimination in Employment Act ("ADEA"). After a trial the jury found that Plitt had willfully violated the ADEA, and the district judge awarded liquidated damages, backpay, and attorney's fees. He denied reinstatement and front pay. Plitt appeals the sufficiency of the evidence for the verdict that it had violated the ADEA, the determination that its violation was willful, the method the district court used for calculating liquidated damages, and the award and amount of attorney's

fees. Coston appeals the denials of reinstatement, front pay, and prejudgment interest. For the reasons stated below we affirm the district court's judgment in all respects except the method of calculating liquidated damages; on that issue alone we reverse and remand.

I

In 1978 at age 55 Sam T. Coston was hired by Plitt Theatres' Midwest Division as a district manager. Plitt is a national chain of movie theaters. Each district manager was responsible for the general operation of a set of movie theaters. In addition to the district managers there was for some period of time a position entitled Operations Manager. Coston became Operations Manager in 1979 but also continued to be a District Manager. The Operations Manager in this Midwest Division in fact reported to a Vice President, Irwin Cohen. Cohen in turn reported to an Executive Vice President, Harold Klein. Klein was Plitt's chief administrative official for the Midwest Division.

When Coston became Operations Manager he received an increase in his salary. The Operations Manager was generally to inspect the theaters, engage in some collective bargaining, help district managers with local problems, help set up budgets, handle customer complaints if necessary, and serve generally as an intermediary between the district managers and the higher management. The Operations Manager position required some travel to supervise the individual theaters, but the amount of travel required was the subject of some disagreement at trial, even between Executive Vice President Klein and Vice President Cohen.

Sometime in late 1981 Plitt determined that it needed to engage in a reduction-in-force ("RIF") of its staff in order to respond to reduced business. On January 4, 1982, Cohen informed Coston in a face-to-face, one-on-one meeting of the poor business conditions and of Plitt's decision to cut expenses by, *inter alia*, eliminating several posi-

tions within the company. Coston was at that time less than sixty years of age. Cohen told Coston that the Operations Manager position was one of the positions being phased out and Coston's position was being terminated as of January 8, 1982. Coston testified that he had no disagreement with the decision to phase out the Operations Manager position, and that he realized that business had been poor and was not surprised to learn that "certain things needed to be done." Coston testified that he asked Cohen why he couldn't stay on and continue as a District Manager rather than one of the younger district managers. According to Coston, Cohen responded that one of the younger district managers (Pat Burns) had seniority with the company, and the other (Kurt Noack) was "super." Coston testified that he then asked if there were any position with Plitt Coston could fill, and Cohen replied that there was none, hesitated, and then added, "Besides, Sam, we have to go along with youth." Coston testified that he then asked if Klein knew of Coston's discharge, and Cohen replied that Klein knew of the decision (Klein in fact had made the decision) and had informed him (Cohen) that there was no other position available for Coston.

Plitt did not appoint a successor Operations Manager, but it did appoint Pat Burns, who had previously been a District Manager for another district, to add Coston's old District Manager position for the Water Tower District to his own district.

Coston brought an action against Plitt in federal district court claiming that in discharging him Plitt violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Plitt claimed that it had discharged Coston in accordance with a RIF necessitated by poor business conditions and that Coston's discharge was appropriate under the ADEA. The case was tried to a jury, which found Plitt liable of a willful violation of the ADEA and assessed commission and bonus damages against Plitt of $9,600. Pursuant to section 626(b) Coston requested reinstatement or front pay, liquidated damages, actual

damages, interest, costs, and attorney's fees. The district court denied both reinstatement and front pay, computed actual damages, and (to reach the liquidated damages figure) first doubled actual damages and then deducted amounts earned in mitigation. The court also granted costs to plaintiffs and awarded plaintiffs attorney's fees of $35,408.50.

Plitt moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. The trial court denied the motions. Plitt now appeals the judgment of liability and the judgment that the liability was willful. Plitt also appeals the award of attorney's fees and the method of calculating liquidated damages. Coston appeals the denials of reinstatement and front pay and the denial of prejudgment interest.

II

A. Sufficiency of the Evidence

The plaintiff in an age discrimination suit under the ADEA has the ultimate burden of proving that age was a determining factor in his or her discharge. *E.g., Mathewson v. National Automatic Tool Co.*, 807 F.2d 87, 89 (7th Cir. 1986); *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). The plaintiff may attempt to meet this burden either through the presentation of direct proof or by utilizing the shifting burden of production method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981). *E.g., Mathewson*, 807 F.2d at 89-90; *La Montagne*, 750 F.2d at 1409. Of course, the ultimate burden of persuasion remains with the plaintiff at all times. *E.g., Mathewson*, 807 F.2d at 89-90; *La Montagne*, 750 F.2d at 1409.

A plaintiff establishes a prima facie case in a reduction-in-force action under the ADEA by

> (1) showing that the plaintiff was within the protected age group; (2) showing that the plaintiff was adversely affected, either by discharge or demotion; (3) showing that the plaintiff was qualified to assume another position at the time of discharge or demotion; and (4) producing circumstantial or direct evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in making the employment decision at issue.

McNeil v. Economics Laboratory, Inc., 800 F.2d 111, 114 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1982 (1987); *see also Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985); *La Montagne*, 750 F.2d at 1409.

In reviewing a jury's verdict we ascertain whether there is substantial evidence in support of the verdict. *E.g.*, *Mathewson*, 807 F.2d at 90. In applying this standard we ascertain whether the verdict finds sufficient support from the evidence presented and all the reasonable inferences that may be drawn in favor of the party winning the verdict; conflicts in the evidence must be resolved in the winning party's favor. *E.g.*, *Mathewson*, 807 F.2d at 90; *La Montagne*, 750 F.2d at 1410. Our role is not to weigh the evidence in search of a preponderance as would a jury, but it is instead the more restrictive function of determining if the evidence in support of the verdict is *substantial*; a mere scintilla of supporting evidence will not suffice. *E.g.*, *Mathewson*, 807 F.2d at 90; *La Montagne*, 750 F.2d at 1410.

Coston was undoubtedly within the protected age group and was adversely affected by his discharge. In addition, Coston admits that business conditions were poor and that steps needed to be taken to reduce costs; there is no real disagreement over the justification for a reduction-in-force at the time of the discharge. Thus the evidence at trial centered on whether Coston was qualified to assume another position at the time his was eliminated, and whether a factfinder might have reasonably concluded that the employer intended to discriminate against Coston in making the discharge decision.

The evidence at trial of Coston's competence was conflicting. There was testimony that suggested that Coston was performing competently and within the range of ability expected. In addition, Klein himself admitted that his decision to discharge Coston was made without knowledge of Cohen's assertions that Coston had performed audits improperly and without exact knowledge of Coston's record of theater visits. With regard to theater visits even the requirements for determining competence are unclear; Klein testified that Coston should have been *in* the office more and Cohen testified that Coston should have been *out* more. It is also undisputed that Coston improved the situation at Water Tower from what it had been during Noack's tenure there as district manager. Therefore there was significant, if not overwhelming, evidence that Coston's work was competent and that he was qualified to remain as a district manager.

The evidence regarding Plitt's intent to discriminate against Coston in his discharge includes both the setting in which the decision was made and a reason explicitly communicated to Coston for his discharge. When Coston asked if he could stay on as district manager the response provided by Cohen was that two younger managers had been chosen to remain because Burns had seniority with Plitt and because Noack was "super." Burns does appear to have had more time at Plitt, but he had served less time as a district manager. In any case, the significance of Burns's seniority as a Plitt employee was uncertain based on the evidence at trial because it is unclear in the record whether Plitt had an established seniority system, whether it was followed, and whether it was triggered by particular positions within the firm or simply by the time of initial employment with Plitt. On such a record the jury was entitled to reject the seniority allegations as pretextual.

In regard to Cohen's comment that Noack was super we need only reiterate that there was testimony from several witnesses at trial, including Klein, that the Watertower Theater was in poor shape during Noack's tenure

there as district manager, a condition that did not recur when Coston took over as district manager there. This testimony undermines any support for the assertion that the discharge of Coston was due to a comparative evaluation of Coston's and Noack's competence. The jury was entitled to conclude that such a rationale was pretextual.

The direct remark of Cohen to Coston during the meeting in which Coston was discharged is the clinching evidence in this scenario. According to Coston's testimony Cohen, in summing up the reasons for Coston's discharge, said, "Besides, Sam, we have to go along with youth." While Cohen testified that he made no such remark, the decision regarding whose testimony to credit was for the jury. Appellate courts may not interfere in the often crucial credibility determinations of a jury. *E.g., Mathewson*, 807 F.2d at 586; *Yarbrough v. Tower Oldsmobile*, 789 F.2d 508, 513 (7th Cir. 1986); *La Montagne*, 750 F.2d at 1410.

Plitt argues that this court's opinion in *La Montagne* establishes that a jury cannot attribute the discriminatory remarks and intentions of others to the official who makes the decision to discharge the employee. Plitt reads *La Montagne* much too broadly. In *La Montagne* we held that the statements of two officers inferior to the official who made the discharge decision were not probative of the discharging official's intent and did not increase or decrease the likelihood that the discharging official intended to discriminate. *La Montagne*, 750 F.2d at 1412. This evidence alone was thus in *La Montagne* insufficient to allow a reasonable jury to conclude that the discharging official had intended to discriminate.

In *La Montagne* the statements were made prior to the decision to discharge and were apparently not communicated to the discharged employee during any discussion of his discharge; the discharging official alone made the decision and carried it out. Here, on the other hand, Klein made the decision but Cohen carried it out. It was Cohen who told Coston of his discharge, and the discriminatory

statement was made during that meeting *after*, of course, Klein's decision to discharge Coston. Cohen was thus carrying out Klein's orders and it was reasonable for the jury to assume that the reasons given by Cohen were those authorized by Klein. While such an inference was not mandated, it was inherently reasonable and was supported by substantial evidence.

In sum, there was substantial evidence in support of the jury's verdict that age was a determining factor in Klein's decision to discharge Coston.

B. "Willful" Violation of the ADEA

The ADEA includes a "liquidated damages" provision that allows damages to be doubled if an employer's violation of the ADEA is determined to be "willful." 29 U.S.C. § 626(b). In this action the trial court relied on *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981), in fashioning its instruction to the jury regarding the standard for determining a "willful" violation of the ADEA. The trial court charged the jury that

> In order for the discrimination by the defendant to have been willful, the defendant's actions must have been knowing and voluntary and the defendant either knew or reasonably should have known that its actions were in violation of the law.
>
> Defendant has admitted that it was at all times aware of the illegality of age discrimination. Whether these elements of willfulness have been proved by the evidence is for you to determine.

Tr. 401; *see Syvock*, 665 F.2d at 156.

After the defendant filed its notice of appeal in this action the Supreme Court decided *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985), which upheld the Second Circuit's definition that a violation of the ADEA was "willful" for the purposes of the liquidated damages provision if "the employer knew or showed reckless disregard for the matter of whether its conduct was pro-

hibited by the ADEA." *Thurston*, 105 S. Ct. at 625. Counsel for *Plitt Theatres* argues that in light of *Thurston* we must reverse and remand the judgment below insofar as it finds that Plitt Theatres acted willfully to violate the ADEA. Coston objects that Plitt waived its right to raise the willfulness issue by not anticipating *Thurston* and therefore not objecting to the use of the *Syvock* instruction.

We do not reach the question of whether Plitt waived its right to appeal the issue of whether *Syvock* is sufficient under *Thurston* because we hold that even presuming that it did not waive its right to appeal the question, *see Rengers v. WCLR Radio Station, slip. op. at 9-10 (7th Cir. Aug. 4, 1987); see also General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152 (7th Cir. 1978) (finding no waiver in similar circumstances); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986); *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (per curiam); *Hegger v. Green*, 646 F.2d 22, 26-27 (2d Cir. 1981) (relying on the reasoning of *General Beverage*), there was no error. This court has quite recently held that the *Syvock* standard used by the trial court in this case for defining "willful" with regard to liquidated damages under the ADEA is consistent with the standard announced in *Thurston*. *Graefenhain v. Pabst Brewing Co.*, slip. op. at 18-19 (June 26, 1987).[1] *Graefenhain* squarely presented the same question with which we are faced today. In that case a jury found the actions of an employer to constitute a willful violation of the ADEA under the *Syvock* standard. The trial court granted a motion for JNOV on the question of whether the ADEA was violated. A panel of this court reversed and held that the trial court had erred in granting the motion for JNOV.

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[1] We recognize that *Graefenhain* and *Renger* appear to be inconsistent with *Powell v. Rockwell International Corp.*, 788 F.2d 279, 285-86 (5th Cir. 1986). Nevertheless, we believe that the *Syvock* instruction as interpreted in *Renger* and the instant opinion is in accord with the analysis of the ADEA provided in *Thurston*.

The *Graefenhain* panel then further held that since *Syvock* and *Thurston* are consistent the jury's determination that the violation was willful must also be affirmed. *Id.* at 18-19. The court in *Graefenhain* noted explicitly that "[b]ased on the record before us, we find that it is not unreasonable for the jury to have found that Pabst management knew or should have known of the ADEA's requirements and therefore that its actions were willful." *Id.* at 19. *Graefenhain* thus controls the result in this case where the jury also found an ADEA violation willful under the *Syvock* standard. While it is certainly true that an instruction of willfulness under the "reckless disregard" language approved in *Thurston* would have also been appropriate, *Graefenhain* holds that the *Syvock* instruction is also sufficient under *Thurston*. The trial court therefore did not err in instructing the jury via the *Syvock* definition of willfulness.

We pause at this point to stress that the *Syvock* standard does not allow a factfinder to determine that a violation of the ADEA was willful if the employer merely knew that the ADEA was "in the picture." *Thurston* rejected the suggestion that an "in the picture" standard was appropriate for determining willfulness for the purposes of authorizing liquidated damages under the ADEA because it would allow the recovery of liquidated damages even if the employer acted reasonably and in complete good faith. *Thurston*, 106 S. Ct. at 625. As a panel of this court noted recently in *Rengers v. WCLR Radio Station*, slip. op. at 11 (7th Cir. Aug. 4, 1987), the *Syvock* standard "comports with this concern because if an employer reasonably should have known that its actions were illegal, then the employer was not acting reasonably." Where the meaning of the ADEA is debatable, an employer's reasonable and good faith construction of the statute's requirements, even if erroneous, cannot be considered willful. In the case at bar, of course, no debatable requirement of the ADEA was at issue. Therefore, there is no possibility that Plitt's action was a reasonable construction of an ambiguous provision of the ADEA.

C. Calculation of Liquidated Damages

The ADEA in general requires that courts follow the Fair Labor Standards Act ("FLSA") in the computation of damages, but it in one respect alters the FLSA's structure: under the ADEA no liquidated damages are awarded unless the plaintiff shows that a willful violation of the ADEA occurred. The statutory language is straightforward:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title [the FLSA damage provisions]: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter [the ADEA].

29 U.S.C. § 626(b).

The recent analysis provided in *Thurston* holds that Congress intended by this language to make the *standard* for granting liquidated damages punitive. 105 S. Ct. at 624-26. Coston argues that we should extend *Thurston*'s analysis to establish that Congress also intended to alter the *method of calculating* liquidated damages from that applied under the FLSA. We believe that adopting Coston's position would be to violate the statutory language of the ADEA and Congress's intent behind that language. We cannot accept the argument that *Thurston* requires a result contrary to Congress's intent in a situation not before the *Thurston* Court.

Thurston involved, in pertinent part, a challenge to the standard by which a "willful" violation of the ADEA is defined. The Supreme Court there determined that "an acceptable way to articulate a definition of 'willful' " under the ADEA's liquidated damages provision is to ask whether " 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Thurston*, 105 S. Ct. at 625-26. We are asked to determine the appropriate method of calculating

liquidated damages once a willful violation is found. As the Fourth Circuit remarked in addressing the same question in light of *Thurston*; "[w]e are not concerned . . . with the question of substantive liability but with a question of calculation." *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985) (specifically addressing the question of whether amounts earned in mitigation of backpay should be deducted before or after doubling and determining that deductions should be made prior to doubling).

It is true, as Coston notes, that *Thurston* states that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." *Thurston*, 105 S. Ct. at 624.[2] This unquestionably

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[2] We recognize that there is language in a Conference Committee report to a later bill amending the ADEA that appears to suggest that Congress believed that liquidated damages under the ADEA are *not* punitive. H.R. Rep. No. 950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535 (Conference Committee Report to H.R. 5383, which became the Age Discrimination in Employment Amendments Act of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978)). In discussing the right to a jury trial on the factual issues underlying a claim for liquidated damages under the ADEA, the Conference Committee noted in pertinent part:

> The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages. *Lorillard v. Pons*, 98 S. Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for punitive damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Transportation Co. v. Missel*, 316 U.S. 572, 583-84 (1942).

(Footnote continued on following page)

means that courts must use a punitive standard to determine whether an ADEA violation is willful. It does not necessarily follow, however, that the method of calculating those liquidated damages (once the punitive standard has been met) must be altered in some fashion from the explicit method of calculation adopted by Congress. Congress, if it had so wished, could certainly have left the amount of liquidated damages under the ADEA to the more freewheeling sort of calculation used generally for punitive damages, but it did not do so. Instead Congress directed that "amounts owing" under the ADEA be deemed amounts owing under the FLSA. 29 U.S.C. § 626(b). The literal language of section 626(b) alters only the FLSA's scheme for *allowing* liquidated damages—they are to be "payable only in cases of willful violations . . . ." *Id.* The statutory language does not, however, modify the FLSA's *method for calculating* those damages.

Such a legislative decision on the part of Congress is eminently sensible. Rather than leaving the method of determining the amount of punitive damages to be fought out in the courts Congress chose to tie the amount of liquidated damages to the amount of harm done in each particular situation. Thus the deterrent power of the penalty is roughly matched to the pecuniary harm incurred. Liquidated damages compensate for those losses that are "too

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[2] *continued*

H.R. Rep. No. 950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535 (Conference Committee Report to H.R. 5383, which became the Age Discrimination in Employment Amendments Act of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978)). If we were considering the question of whether the standard for awarding liquidated damages is punitive on a clean slate we would of course consider the entire legislative history behind the liquidated damages provision ourselves. Nevertheless, it is equally apparent that the Supreme Court has confronted that question and spoken authoritatively: the standard for determining liquidated damages under the ADEA *is* punitive. We are therefore of course bound to proceed with that characterization in mind.

obscure and difficult of proof for estimate other than by liquidated damages," H.R. Rep. No. 950, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535 (quoting *Overnight Transportation Co. v. Missel*, 316 U.S. 572, 583-84, 62 S. Ct. 1216, 1223 (1942) (an FLSA case)), and are not awarded absent a finding that the employer's actions have met the punitive standard embodied in the definition of a "willful" violation. Such a scheme makes use of the FLSA's liquidated damages provision, which is already in place and working, and allows for more predictable and consistent results in litigation brought for violations of the ADEA.

This result is also consistent with the legislative history. In a "Joint Explanatory Statement of the Committee of Conference" of the House and Senate managers of the Age Discrimination in Employment Act Amendments of 1978 the conference committee noted expressly that the "amounts owing" language of section 626(b)

> contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.

H.R. Rep. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535 (parenthetical expression in original). This legislative history thus directly requires that the *amount* of liquidated damages be determined as "an amount equal to the pecuniary loss," as part of the remedy required by section 626(b), which "incorporates the remedial scheme of sections 11(b) [29 U.S.C. § 211(b)], 16 [29 U.S.C. § 216], and 17 [29 U.S.C. § 217] of the FLSA . . . ." *Id.* Thus the amount of actual harm done the plaintiff must be determined prior to doubling the damage award as required to establish liquidated damages. Therefore any amounts earned in mitigation of the backpay compensatory award must be deducted prior to doubling.

This result is not inconsistent with *Thurston*, for we do not here in any way suggest that liquidated damages are to be awarded without a showing that the ADEA violation was willful. Our decision on this issue affects only the calculation of the liquidated damages once the punitive standard has been met. In adopting the method of calculation we describe today we do no more than simply apply Congress's decision that the amount of such damages should be determined by the method used in the FLSA, which is based on the actual harm suffered.

The result we reach on this question is also consistent with the theory behind the bulk of the decisions of the courts of appeals regarding the assessment of liquidated damages within the remedial scheme of the ADEA. In *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985), for example, the Fourth Circuit in a post-*Thurston* case faced the same question we face today and also determined that amounts earned in mitigation of backpay must be deducted prior to determining liquidated damages under the ADEA. *Id.* at 967. More generally, the overwhelming majority of courts have treated the question of determining the amount of liquidated damages as if they were a nonpecuniary compensatory loss under the FLSA. *E.g., Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985); *Blim v. Western Electric Co.*, 731 F.2d 1473, 1479-80 (10th Cir.), *cert. denied*, 469 U.S. 874, 105 S. Ct. 233 (1984); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1552 (11th Cir. 1984), *overruled by Lindsey v. American Cast Pipe Iron Co.*, 810 F.2d 1094, 1101-02 (11th Cir. 1987); *Rose v. National Record Corp.*, 703 F.2d 225, 230 (6th Cir.), *cert. denied*, 464 U.S. 939, 104 S. Ct. 352 (1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101-03 (8th Cir. 1982); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Spagnoulo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir.), *cert. denied*, 454 U.S. 860, 102 S. Ct. 316 (1981). *Contra Lindsey v. American Cast Pipe Iron Co.*, 810 F.2d 1094, 1101-02 (11th Cir. 1987); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556-57 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400, 105 S. Ct. 2743 (1985).

D. Denial of Reinstatement

The ADEA grants broad remedial powers to enable the courts to make a plaintiff whole. *See* 29 U.S.C. § 626(b). This court has recently noted that "[a]lthough reinstatement is usually the preferred remedy, reinstatement is not always appropriate." *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1983 (1987). The decision regarding reinstatement is within the discretion of the district court, *e.g.*, *id.*, *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859, 103 S. Ct. 131 (1982), and several factors may persuade the district court after careful consideration in a particular case that the preferred remedy of reinstatement is not possible or is inappropriate, *e.g.*, *McNeil*, 800 F.2d 118 (hostility in the relationship or the lack of an available position may make reinstatement inappropriate). The two factors relied upon by the district court here were hostility between the employer and the employee that makes futile any reinstatement order, and the lack of an available position in which to reinstate the plaintiff.

We are of course cognizant of the legitimate concern that the hostility common to litigation not become an excuse to avoid ordering reinstatement on a general basis, and thus to frustrate the purposes of the ADEA to eradicate age discrimination and to make whole those who suffer violations. That is not what happened here. Coston had a position in which he was required to hold himself out to the public as a managerial representative of the employer. He held significant managerial, public responsibilities, including some collective bargaining and handling customer complaints. Where the employee's job profile takes him beyond responsibilities internal to the employer's business, and where those public responsibilities can fairly be perceived as managerial, the employer's legitimate concern for the public image of the business may be fatally undermined where hostility permeates the relationship between employer and employee. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728-29 (2d. Cir. 1984)

(hostility may prevent reinstatement from being possible under the facts of a particular case); *Dickerson v. Deluxe Check*, 703 F.2d 276, 280 (8th Cir. 1983) (sensitivity of an employee's position within a firm may make reinstatement inappropriate); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 846 (W.D. Okla. 1976) (reinstatement as news anchorman denied because the sensitivity of the position would allow discord and antagonism to produce a "very difficult working environment, with the particular difficulty of being perceivable to the viewing audience").

In addition, Coston served as a higher level managerial representative, in a situation where the employer's or the employee's hostility could well render useless any efforts made to reinstate the employee. *E.g.*, *McNeil*, 800 F.2d at 118; *Dickerson*, 703 F.2d at 280 (accepting the validity of decisions not to reinstate employees in "high level, unique, or unusually sensitive positions" although finding no such concerns in the case before it and ordering a remand to order reinstatement); *EEOC V. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d. Cir.), *cert. denied*, 434 U.S. 920, 98 S. Ct. 395 (1977) (refusing reinstatement where the employee's job "required a close working relationship [with] top executives of defendant" and "involved frequent personal contacts with defendant's clients, with plaintiff acting as defendant's representative"). Here, Coston served effectively as the link between district managers and the higher management. Given the higher management's perceived loss of trust and confidence in Coston the district managers might well refuse to continue to use Coston as an intermediary. Moreover, even if Coston were returned to solely a district manager's position he would still be the only representative of higher management regularly to visit the theaters within his district, since his old position as Operations Manager has been abolished.

In addition, we also note that a continued reduction-in-force may make reinstatement infeasible, *e.g.*, *McNeil*, 800 F.2d at 118; *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728-29 (2d. Cir. 1984); *Cancellier*, 672 F.2d at 1319

(continued reduction-in-force may make reinstatement inappropriate). In this case the district court found that no new Operations Manager was selected and that a district manager had added Coston's responsibilities as a district manager to his own. In addition, the district court found that while Plitt did create a new position entitled "district manager-in-training" Plitt did not anticipate any promotion of the district-manager-in-training to full district manager. There was conflicting evidence on this point and thus these findings are not clearly erroneous in light of support within the record. Thus, while this factor alone might not allow refusal of reinstatement we believe it weighs in support of our determination that the district court did not abuse its discretion in denying reinstatement.

Coston has also challenged the district court's refusal to order reinstatement on the ground that the jury's verdict should have foreclosed the district court from relying on the employer's belief that Coston was incompetent in making his decision regarding reinstatement. Coston's position, however, misunderstands the meaning of an ADEA violation. Such a finding only requires that age in fact be a determining factor in the employer's decision to discharge, whatever the employer's belief regarding competence. *La Montagne*, 750 F.2d at 1409. Thus the jury here need not have found that the employer believed Coston to be competent.

While we recognize that portions of the district court's discussion of reinstatement might appear to question Coston's competence when read alone, a review of the entire discussion reveals that the district court was not passing on Coston's competence but instead noting the effect of the employer's belief of Coston's incompetence on the desirability of reinstatement. The district court stated in pertinent part that:

> There also seems to be some question as to the quality of plaintiff's work. Evidence at trial indicated *defendant's dissatisfaction* with the quality of plaintiffs [sic] work. Furthermore, defendant states in its

> response that plaintiff improperly delegated responsibilities, had trouble making decisions on his own, failed to visit some theaters in his district and visited others infrequently. Ordering plaintiff back to his former position with Plitt Theatres would not be a productive solution *given defendant's dissatisfaction* with the quality of plaintiff's work.

District Court's Order of October 3, 1984 at 4 (*inter alia* denying reinstatement) (emphasis added). The demeanor of the parties and witnesses crucial to such a difficult, but perfectly plausible, determination was within the observation of the district judge and is supported by the record; we cannot say that the trial court's factual determination was clearly erroneous or that its ultimate decision not to reinstate Coston was an abuse of its discretion. *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1099-1100 & n.6 (8th Cir. 1982) (performing a similar review of whether a district court's findings underlying a discretionary equitable decision were consistent with the jury's verdict); *Cancellier v. Federated Department Stores*, 672 F.2d at 1319 (upholding a district court's decision to refuse reinstatement in part in reliance on the district court's findings of hostility, including the employer's "numerous attacks during trial on plaintiff's abilities"); *see also Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 607 (7th Cir. 1985) (factual findings by a trial judge in determination of whether a plaintiff had proved her damages is subject to the clearly erroneous standard rather than abuse of discretion, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424, 95 S. Ct. 2362, 2374 (1975)).

Given such concerns we cannot say that the decision of the experienced trial judge to refuse reinstatement under the circumstances of this case was an abuse of discretion.

E. Denial of Front Pay

The ADEA authorizes district courts to structure remedies to make plaintiffs whole for violations of the ADEA.

Thus, this circuit has recently held that "front pay may be an available remedy in an appropriate case." *McNeil*, 800 F.2d at 118. In deciding whether front pay is appropriate, we have noted that the district court in its discretion should consider the circumstances of each particular case, and should note such factors as whether: the plaintiff has a reasonable prospect of obtaining comparable employment; the time period for the award of front pay is relatively short; and whether liquidated damages have been awarded (and if so, in what amount). *McNeil*, 800 F.2d at 118-19.

In this case the district court denied front pay after noting the speculative nature of the remedy on the facts in the record before it. The district court noted that neither party presented any evidence regarding a discount rate and also suggested that neither party "specifically address[ed] the issue of whether the plaintiff intended to work, or was physically capable of working, until his full retirement age." The district court also noted that Coston in his complaint asked only for "lost wages" and in his pretrial submissions did not raise the question of front pay.[3]

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[3] Coston has argued that the district court incorrectly read the record and pleadings in his determination regarding front pay. While we have some minor concerns regarding some comments within the district court's discussion we believe that it is abundantly clear that the district judge's ruling was not an abuse of discretion based on the record established in the case. The district court's discussion of the front pay issue apparently overlooked Coston's request for front pay (if reinstatement were not ordered) in his pretrial memorandum. The district court also apparently did not note the statement of Coston in the trial testimony that "I was in hopes I could spend the remaining working years of my life with Plitt, but I guess it's just not to be." While this testimony was given in regard to a conversation Coston had with Executive Vice President Klein a few days after he was notified of his discharge, we believe that especially when the statement is considered together with Coston's claim for reinstatement, it represents some evidence of Coston's intent at the time of trial to continue

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Despite the indication in the pretrial memorandum that Coston wished front pay if reinstatement was not awarded, Coston's counsel was entirely silent at trial on the issue of front pay. He did try to the jury the facts concerning bonuses and commissions for the purposes of backpay, and he also submitted (with Plitt's counsel's agreement) a stipulation to the judge regarding salary and earnings in mitigation, also explicitly for the purposes of backpay. But he never offered any evidence or argument in regard to the issue of front pay, either before the jury or to the judge. He neither tendered to the judge a proposed jury instruction regarding front pay calculations nor even suggested whether he intended to try the amount of any such front pay award to the jury or to the bench.[4]

Thus it is not surprising that Plitt's counsel offered no evidence or argument regarding front pay during the trial; he had seen only the ambiguous "lost wages" remark in the complaint, and while he would have seen the alternative front pay request in the pretrial memorandum he was entitled to assume from the lack of any proof or argument at trial that Coston's counsel had chosen to rest his future damages claim solely on an order for reinstatement.[5] In similar fashion, it is entirely unremarkable that

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[3] *continued*
working until some retirement age. Nonetheless, we believe that the district court's failure to take into account these items does not, considering the other overwhelming speculative factors involved in computing front pay in this case, suggest any abuse of discretion by the trial court.

[4] We have no occasion in this opinion to consider whether any or all of the underlying factual elements of an equitable award of front pay damages should be submitted to a jury absent the parties' agreement to try such facts to the trial judge. Authority and reason both suggest that while the decision to award front pay is within the discretion of the trial court, the amount of damages available is a jury question. *E.g., Maxfield v. Sinclair International*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 796 (1986).

[5] Our opinion today rests solely on the failure to present even a reasonable theory of a front pay award to the judge or jury during the trial.

the trial judge should have been surprised by the post-trial resurrection of the pretrial memorandum's argument for front pay as an alternative remedy to reinstatement.

We recognize that the courts of appeals have made forceful statements that front pay is necessary in order to make plaintiffs whole if reinstatement is not ordered. *E.g., Maxfield v. Sinclair International*, 766 F.2d 788, 795-96 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 796 (1986); *EEOC v. Prudential Federal Savings and Loan Association*, 763 F.2d 1166, 1172-73 (10th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); *Whittlesey v. Union Carbide Corp., Inc.*, 742 F.2d 724, 728 (2d Cir. 1984). Nevertheless, we have no occasion to decide today the strength of such arguments or how they ought to affect the trial court's discretion to award front pay in this particular case. The simple fact of the matter is that in the circumstances of the case before us the trial judge was offered virtually none of the information from which a reasonably certain award of front pay could have been calculated, even assuming that the trial judge was the proper factfinder to make such a determination. *Cf. Williamson v. Handy Button*, slip. op. at 12 (7th Cir. May 4, 1987) (noting that even where prejudgment interest would otherwise be awarded a denial of prejudgment interest is proper where the amount is not reasonably ascertainable).

Perusal of the backpay stipulation undermines Coston's implied reliance on that document before this court, for the document itself purports only to establish payments for various components of *backpay*—the stipulation is entitled *STIPULATION AS TO AMOUNT OF BACKPAY AND BENEFITS*, which, fairly read, refers to income lost during the backpay period due to Coston's loss of salary and commissions. There is no indication in the document that it purports to establish figures for front pay calculations, and we think any such inference patently unjustifiable in light of the failure of Coston before or at trial to make any overt statement of reliance on the stipulation for the purposes of front pay. Such a use of the stipulation would clearly exceed the scope of the terms

to which the opposing party can fairly be considered to have agreed. While it is true that the stipulation purports to establish per diem rates for components of income for days after March 31, 1984, the title of the stipulation referencing only backpay and the repeated references within the document to backpay make it abundantly clear that Plitt's counsel was agreeing only to those amounts for the purposes of backpay and in no way intended to bind Plitt to any agreement regarding the appropriate figures with which to calculate front pay. Thus there is no evidence in the stipulation itself or elsewhere in the trial record regarding the appropriate amount of any front pay award.

This uncertainty is compounded by the fact that Coston's pay at Plitt was composed of several distinct elements, all of which would have had to have been in some manner prognosticated for the future. According to the backpay stipulation Coston was not only paid a basic wage but also was offered certain bonuses and commissions. The rates for these bonuses and commissions in 1981 and 1982 were established by the joint backpay stipulation and Coston argued to the jury the appropriate amounts for the backpay period. However, he never presented any forecast of future bonuses and commissions. In addition, there is an amount labelled "gross lost non-wage benefits" in the backpay stipulation, and Coston offered no evidence regarding the appropriate future remuneration for those benefits (or evidence regarding of what such "non-wage" benefits consisted). Moreover, there was no evidence offered regarding whether Coston intended in the future (if he was not reinstated) to continue in the work that provided the amounts earned in mitigation of the backpay award.

Finally, as the district court noted, there was absolutely no evidence offered with regard to what discount rate would be appropriate to discount the future pay award to present value. While some courts have adopted particular rates to use for discounting future awards in the

absence of testimony from the parties, *see, e.g., Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 40 (2d Cir. 1980) (adopting a 2% discount rate adjustment for inflation absent testimony from the litigants), *cert. denied*, 451 U.S. 971, 101 S. Ct. 2049 (1981); *McCrann v. United States Lines, Inc.*, 803 F.2d 771 (2d Cir. 1986) (applying *Doca*), there is no such rule in this circuit. This court requires "district judges in this circuit to indicate the steps by which they arrive at damage awards for lost future earnings," *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1201 (7th Cir. 1982), and we have described that a "responsible calculation of lost future earnings would . . . require[ ] estimating first what [an individual's] salary would have been in each year until his retirement, then the probability that he would actually be alive and working in those years, and finally the correct discount rate by which to reduce the estimated future earnings to a present, lump-sum value." *United States v. Fountain*, 768 F.2d 790, 802 (7th Cir.), *modified on other grounds*, 777 F.2d 345 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1647 (1986); *see also Nemmers v. United States*, 795 F.2d 628, 633-34 (7th Cir. 1986) (discussing application of the *O'Shea* procedure and noting district court's at least partial reliance upon expert testimony in the record); *cf. Williamson*, slip. op. at 10-11 (suggesting in dicta that a trial court might be able to use a 2% discount rate in calculating damages without mentioning whether the trial court could adopt such a figure absent record testimony). Thus while we have no reason today to resolve the question of whether a district court could adopt a discount rate in the absence of record testimony, it is readily apparent that the absence of any such testimony increases the speculative nature of any award for front pay. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S. Ct. 2541 (1983) (canvassing varying methods of determining discount rates and rules of various common-law courts regarding those methods).

While courts are authorized, as Coston notes, to award the damages justified on the facts proven in the record

in the individual case even without an explicit request for such relief, *e.g.*, *Williamson v. Handy Button Co.*, slip. op. at 11-15 (7th Cir. May 4, 1987); *Kaszuk v. Bakery and Confectionery Union*, 791 F.2d 548, 559 (7th Cir. 1986), there was absolutely no evidence produced in this record regarding many of the elements essential to structure a reasonable front pay award. The district judge was well within his discretion to deny an award of front pay under the circumstances of this case.[6]

F. Denial of Prejudgment Interest

We have recently held in an age discrimination action that to allow awards of both prejudgment interest and liquidated damages would be to provide "compensation beyond that contemplated by Congress when it authorized awards of liquidated damages under § 626." *Kossman v.*

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[6] We note for the sake of clarity that our discussion here does not address, much less decide, which party should carry the burden of proof with regard to the amount of front pay to be awarded. We hold here only that the statement in a pretrial memorandum of a proposed form of calculation does not discharge the plaintiff's duty in an ADEA case to come forward at trial with some evidence from which a reasonable calculation of a front pay award can be constructed. *Compare, e.g., Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 (11th Cir. 1982) (adopting as a "broad rule of Title VII damages" the requirement that in fixed-term employment cases "a plaintiff must initially introduce some evidence showing that the economic injury resulting from the discharge extended beyond the employment term" but given such evidence, placing burden of persuasion on the defendant to show that the plaintiff discriminated against would not have remained employed beyond the contract term) *and Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1514-15 (11th Cir. 1986) (indicating that *Walker*'s discussion of burdens of proof is applicable to similar situations under the ADEA) *with Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 n.7 (8th Cir. 1982) (noting in reference to a finding regarding how long an employee would have retained his position absent a discriminatory discharge that "[w]e believe that in an ADEA action, the plaintiff bears the ultimate burden of persuasion on damages issues").

Calumet County, 800 F.2d 697, 702-03 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1294 (1987). In addition, all but one of the federal circuits that faced the issue prior to *Thurston* reached the same result. *Blim v. Western Electric Co.*, 731 F.2d 1473, 1479-80 (10th Cir.), *cert. denied*, 469 U.S. 874, 105 S. Ct. 233 (1984); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1552 (11th Cir. 1984), *overruled by Lindsey v. American Cast Pipe Iron Co.*, 810 F.2d 1094, 1101-02 (11th Cir. 1987); *Rose v. National Record Corp.*, 703 F.2d 225, 230 (6th Cir.), *cert. denied*, 464 U.S. 939, 104 S. Ct. 352 (1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101-03 (8th Cir. 1982); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Spagnoulo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir.), *cert. denied*, 454 U.S. 860, 102 S. Ct. 316 (1981). *Contra Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556-57 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400, 105 S. Ct. 2743 (1985).

Nevertheless, we must take note of the fact that a divided panel of the Eleventh Circuit has very recently disavowed that circuit's earlier *O'Donnell* decision (and created a conflict with our post-*Thurston* decision in *Kossman*), which had joined the overwhelming majority of the circuits. The *Lindsey* court held that both prejudgment interest and liquidated damages may be allowed in an ADEA case. *Lindsey v. American Cast Pipe Iron Co.*, 810 F.2d 1094, 1101-02 (11th Cir. 1987). The *Lindsey* majority claims that *Thurston*'s announcement that "Congress intended for liquidated damages to be punitive in nature," *Thurston*, 105 S. Ct. at 624, undermines the rationale of the opinions barring the award of both liquidated damages and prejudgment interest in the same ADEA action. The rationale supporting the majority rule has been that liquidated damages under the ADEA are to provide for otherwise difficult to calculate costs such as the loss of the use of unpaid wages. *E.g.*, *Kossman*, 800 F.2d at 702-03. Therefore, to allow prejudgment interest would double a successful ADEA plaintiff's recovery, since that prejudgment interest is designed to com-

pensate the plaintiff for the loss of the use of the unpaid wages.

As Judge Vance noted in his dissent in *Lindsey*, Congress in the ADEA explicitly mandated the amounts owing under the ADEA are to be deemed amounts owing under the FLSA. *See* 29 U.S.C. § 626(b); *Lindsey*, 810 F.2d at 1102 (Vance, J., dissenting). The only qualification to the command to look to the FLSA to determine damages under the ADEA is the condition that under the ADEA liquidated damages will only be awarded upon a finding that the violation of the ADEA was willful. Congress's language is unmistakable and therefore we repeat it once again:

> Amounts owing to a person as a violation of this chapter [the ADEA] shall be deemed to be unpaid wages or unpaid overtime compensation for the purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter.

29 U.S.C. 626(b) (sections "216 and 217 of this title" are the primary sections establishing damages under the FLSA). The only proviso, as we have noted before in this opinion, *see supra* section IIC, requires liquidated damages under the ADEA to be awarded according to a punitive standard. Therefore, the calculation of the amount of each award must obey Congress's mandate to follow the provisions of the FLSA for calculating damages.

Thus *Thurston* does not undermine the rationale of *Kossman* and the many other decisions reaching the same result; while *Thurston* requires that liquidated damages only be awarded after a punitive standard has been met, *Thurston* does not determine how those damages shall be calculated. This is an unexceptionable result, considering Congress's explicit mandate in section 626(b) that ADEA damages are to be calculated as FLSA damages are calculated.

It is settled that under the FLSA prejudgment interest is not allowed where liquidated damages have been awarded.

See, e.g., Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 715-16, 65 S. Ct. 895, 906 (1945); *Gibson*, 695 F.2d at 1102; *Masters v. Maryland Management Co.*, 493 F.2d 1329, 1334 (4th Cir. 1974); *see also Overnight Transportation Co. v. Missel*, 316 U.S. 572, 583-84, 62 S. Ct. 1216, 1223 (1942). The courts determining damages in ADEA cases should not whittle into the damages analysis required by the FLSA simply because the result might be different if one looked at the ADEA as a separate animal from the FLSA and ignored the congressional command to look to the FLSA for damages. The decision to provide damages to ADEA plaintiffs as if they were FLSA damages is a decision made by Congress that precludes the courts from "legislating" their own favored remedies. We remain convinced of the accuracy of the result in our 1986 opinion in *Kossman*, and we thus hold that in ADEA cases prejudgment interest may not be awarded where liquidated damages are also awarded.[7]

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[7] The rule of law that in ADEA cases prejudgment interest cannot be allowed in addition to an award of liquidated damages is, as we have said, based on the reasoning that liquidated damages under the ADEA in part account for harm otherwise difficult to calculate, an example of which is the value of the use of income lost due to discrimination. *See, e.g., Kossman*, 800 F.2d at 702-03; *see also Heiar v. Crawford County*, 746 F.2d 1190, 1202 (7th Cir. 1984) (suggesting that liquidated damages under the ADEA may have been intended "in whole or part to compensate victims of willful violations for other items of damage, such as delay . . ."), *cert. denied*, 105 S. Ct. 3500 (1985). Our reasoning here is based on the particular method under the ADEA of calculating liquidated damages. Therefore, our decision today does not suggest that prejudgment interest may not be allowed in addition to punitive damages under other statutes. *See, e.g., Williamson v. Handy Button Co.*, slip. op. (7th Cir. May 4, 1987) (reversing and remanding a decision not to allow prejudgment interest where punitive damages were awarded in order for the district court to determine if the amount of prejudgment interest was readily ascertainable in a case under 42 U.S.C. § 1981). Nor does our decision today affect the rule that absent an award of liquidated damages the decision to award prejudgment interest in an ADEA case is within

(Footnote continued on following page)

G. Award of Attorney's Fees

Plitt also attacks the award of attorney's fees under 42 U.S.C. § 1988 to the prevailing plaintiff in this case as excessive. Plitt complains that the failure of Coston's counsel to gain an award of front pay requires a reduction of the lodestar amount in the case, that is, the amount resulting from the multiplication of the hours worked on the case by a reasonable hourly rate. *See, e.g., Hensley v. Eckherhart*, 461 U.S. 424, 433-434, 103 S. Ct. 1933, 1939-40 (1983); *Spanish Action Committee of Chicago v. City of Chicago*, 811 F.2d 1129, 1132-33 (7th Cir. 1987). The decision regarding the amount of the fee award is within the district court's discretion. *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1491; *Spanish Action Committee*, 811 F.2d at 1134. The plaintiff achieved substantial relief on the claims brought and lost no separable claim. Front pay was merely a possible component of relief, not a separate cause of action. In addition, the work involved in pressing that remedy was substantially similar to the analysis and research required to establish a basis for damages for backpay. While Plitt also complains that the fee rate was excessive for the character of the work performed, the district court determined that the hours claimed reflected a "very reasonable number of hours" and the record supports that determination. The process used by the district judge to determine the amount of attorney's fees complies with that mandated in *Hensley* as applied in this circuit. *See, e.g., Spanish Action Committee*, 811

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[7] *continued*

the discretion of the trial court. *Kossman*, 800 F.2d at 702; *Heiar*, 746 F.2d at 1201. *Cf. Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1426 (7th Cir. 1986) (noting in a case brought under Title VII and 42 U.S.C. § 1981 that "[t]he curious thing about cases dealing with the award of prejudgment interest to federal civil rights plaintiffs is that most cases treat it as a matter within the discretion of the district court judge, even when, as in this case, the principal to which it is sought to be affixed is an award of backpay under a civil rights statute.") (obiter dictum).

F.2d at 1133-34. The district court committed no abuse of discretion in its award.

III

Pursuant to this opinion, the decision of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion. Circuit Rule 36 shall not apply. Costs to appellant.

MANION, *Circuit Judge, concurring in part.* I join in the majority's thorough and well-reasoned opinion. I write separately only to discuss our holding that the "knew or should have known" standard for willfulness enunciated in *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981), is consistent with the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). This conclusion is mandated because two recent decisions of this circuit, *Graefenhain v. Pabst Brewing Co.*, No. 85-3094 (7th Cir. June 26, 1987) and *Rengers v. WCLR Radio Station*, No. 86-1548 (7th Cir. August 4, 1987) have held that *Syvock*'s "knew or should have known" standard was acceptable under *Thurston*.[1] Although those precedents control our decision, I question their application of *Thurston*.

[1] It should be noted that this circuit has treated ADEA "retaliation" cases differently from other types of disparate treatment violations. In *Rose v. Hearst Magazines*, 814 F.2d 491, 493 (7th Cir. 1987), the court held that it was inherently inconsistent for a jury to find that an employer discriminated against an employee because the employee filed a discrimination claim and that the employer had not acted willfully. In other words, the court treated the issue of liability and willfulness as the same question. As a practical matter, single-tiered liability is imposed. For willfulness purposes, however, a "retaliation" case would seem to be no different from any other disparate treatment case. In either case the jury simply finds that a prohibited factor (age or the filing of a claim) motivated the employer's conduct.

Since *Thurston*, every other circuit addressing willfulness in ADEA disparate treatment cases has adopted the "knew or showed reckless disregard" standard found to be acceptable in *Thurston*, see *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1435 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 1199 (1986); *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285-86 (5th Cir. 1986); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50-51 (6th Cir. 1985); *Nolting v. Yellow Freight System, Inc.*, 799 F.2d 1192, 1197-98 (8th Cir. 1986); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1495-96 (9th Cir. 1986); *Smith v. Consolidated Mutual Water Co.*, 787 F.2d 1441, 1443 (10th Cir. 1986); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099-1100 (11th Cir. 1987), except for the Third Circuit, which has adopted a higher "outrageousness" standard for liquidated damage awards in individual disparate treatment cases. *Dreyer v. Arco Chemical*, 801 F.2d 651, 657-58 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 1348 (1987). In *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285-86 (5th Cir. 1986) the Fifth Circuit specifically rejected a "knew or should have known" instruction as being inconsistent with *Thurston*. Although there is some conflict over the effect of the failure to apply the willfulness standard, *compare Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1435 (4th Cir. 1985) (reverses and remands district court's failure to give proper willfulness instruction) *with Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285-86 (5th Cir. 1986) (holds error to be harmless), the Seventh Circuit appears to stand alone in applying a less stringent standard than the "knew or showed reckless disregard" standard found to be acceptable by the Supreme Court in *Thurston*.

Syvock's "should have known" standard and *Thurston's* "reckless disregard" standard cannot peacefully coexist. *Syvock* only requires negligence as a threshold for finding willfulness; *Thurston* requires recklessness. The law has always made a large distinction between negligent and reckless conduct particularly regarding the award of punitive damages. Given that *Thurston* states that the award

of liquidated damages is punitive in nature, *see* 469 U.S. at 125, *Syvock's* "should have known" standard does not square with either the language or the rationale of *Thurston*.

This circuit's persistence in retaining the *Syvock* standard will cause confusion. Plaintiffs will request a *Syvock* instruction, defendants will request a *Thurston* instruction. The loser will appeal if his instruction is rejected (or if both instructions are given!); at that point we will face this dilemma once again. We cannot reverse a *Thurston* instruction when the Supreme Court has found it acceptable. On the other hand, *Graefenhain* and *Rengers* tell us we must uphold a *Syvock* instruction. Absent the adoption of a novel theory that recklessness and negligence are indistinguishable, we cannot justify the conflict. While the Third Circuit may have taken an extra step in *Dreyer v. Arco Chemical*, 801 F.2d at 657-58 by requiring outrageous conduct to be shown before liquidated damages may be awarded, this circuit refuses to take the step necessary to be in line with *Thurston* and with the other circuits that have addressed this issue.

In addition to the *Thurston* conflict, any future review of the willfulness issue should clearly explain that the "knew" part of either a "knew or showed reckless disregard" standard (*Thurston*) or a "knew or should have known" standard (*Syvock*) means that the employer *knew he was violating* the ADEA. The Supreme Court has emphasized that willfulness is not established merely by showing that the ADEA was violated and that the employer *knew of* the ADEA. *Thurston*, 469 U.S. at 127-28. Stating the *Syvock* or *Thurston* standard without further clarification concerning what is meant by "knew" leaves an unacceptably high risk that the jury will impose liquidated damages simply because the employer knew the ADEA existed.

In sum, our decision in this matter is controlled by this circuit's precedent in *Graefenhain* and *Rengers*. Those precedents, however, need our reexamination in light of the discrepancy between the standards presented in

Thurston and *Syvock*. If we do not reconcile that discrepancy we will create unnecessary confusion throughout the circuit on the proper definition of a willful violation of the ADEA.

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JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinos 60604

September 23, 1987.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

SAM T. COSTEN,
Plaintiff-Appellee, Cross-Appellant,

Nos. 86-2109, 86-2137 and 86-2144

vs.

PLITT THEATRES, INC., a corporation,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 618

Stanley Roszkowski, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings, with costs to appellant, in accordance with the opinion of this Court filed this date.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 28, 1987.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

SAM T. COSTON,
Plaintiff-Appellee,
No. 86-2109, 86-2137, 86-2144

v.

PLITT THEATRES, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 618

Stanley J. Roszkowski, Judge

ORDER

On consideration of the petition for rehearing *en banc* construed as a petition for rehearing with suggestion for rehearing *en banc* filed in the above entitled cuase by Plitt Theatres, Inc., no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition be, and the same is hereby DENIED.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 23, 1987.

Before

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

SAM T. COSTEN,
Plaintiff-Appellee, Cross-Appellant,

Nos. 86-2109, 86-2137 and 86-2144

vs.

PLITT THEATRES, INC., a corporation,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 618

Stanley Roszkowski, Judge

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO RECALL MANDATE" filed herein on November 16, 1987 by counsel for the defendant-appellant.

2. "COSTON RESPONSE IN OPPOSITION TO PLITT MOTION TO RECALL MANDATE" filed herein on November 17, 1987.

On consideration thereof,

IT IS ORDERED that the "MOTION TO RECALL MANDATE" is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SAM T. COSTON,
Plaintiff,

vs.

PLITT THEATRES, INC.,
Defendant.

No. 83 C 618

ORDER

Before the court is plaintiff's petition for entry of judgment subsequent to a jury verdict in his favor. The court's jurisdiction is predicated upon 29 U.S.C. §§ 621-634 and § 626(b). For the reasons stated below, plaintiff is awarded $106,443.40.

I. BACKGROUND

In this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621-634 (1976), a jury verdict was rendered in favor of plaintiff on March 29, 1984. The jury found the defendant committed a willful violation of the ADEA and assessed $9,600 in damages for unallocated commissions and/or bonuses due him. This court thereafter entered judgment on the verdict. In his timely post-trial petition for entry of judgment, plaintiff seeks the following relief pursuant to § 626(b) of the ADEA: reinstatement or damages in lieu of reinstatement, computation of actual damages and liquidated damages, prejudgment interest, court costs, and attorney's fees.

II. DISCUSSION

The purpose of the Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. §§ 621-634 (1976), is

to make employees within the protected age group whole for losses sustained as a result of unlawful employment discrimination. Section 626(b) of the ADEA grants district courts broad discretion in fashioning both legal and equitable relief for wrongfully discharged plaintiffs.

A. Reinstatement

Plaintiff seeks to be reinstated to his former position with Plitt Theatres. "Reinstatement is not a mandatory remedy; it lies within the discretion of the trial court after careful consideration of the particular facts of the case." *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 103 S.Ct. 131 (1982). In determining whether or not to order reinstatement, however, a court may consider a number of factors,[1] including the quality of the plaintiff's work,[2] the sensitivity of the plaintiff's position with the defendant company,[3] and the defendant's continued reduction in force.[4] In *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841, 847 (D.C. Okl. 1976), the court stated, "[t]he need is to protect workers against discrimination and to be realistic and considerate to avoid unconscionable difficulties to both workers and employers as would result here from reinstatement."

In the instant case, reinstatement would be undesirable for both plaintiff and defendant. There is evidence of

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[1] *Kiel v. Goodyear Tire and Rubber Co.*, 575 F.Supp. 847 (N.D. Ohio 1983).

[2] *Ginsberg v. Burlington Industries, Inc.*, 500 F.Supp. 696 (S.D. N.Y. 1980); *Kiel v. Goodyear Tire and Rubber Co.*, 575 F.Supp. 847 (N.D. Ohio 1983).

[3] *Dickerson v. Deluxe Check*, 703 F.2d 276 (8th Cir. 1983).

[4] *Cancellier v. Federated Department Sotres*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S.Ct. 131 (1982); *Cleverly v. Western Electric Co., Inc.*, 450 F.Supp. 507 (W.D. Mo. 1978), *aff'd.* 594 F.2d 638 (1979); *Kiel v. Goodyear Tire and Rubber Co.*, 575 F.Supp. 847 (N.D. Ohio 1983).

legitimate business reasons other than age for discharging plaintiff. Plaintiff held a unique and sensitive position in defendants organization. In his capacity as district manager, plaintiff had frequent contact with defendants clients and often served in a decision making role for the company. Thus, any discord, tension, suspicion, antagonism or lack of trust and confidence could lead to misunderstandings, misrepresentations and mistakes, and could seriously damage defendant's relationship with its clients. *Combes*, 421 F.Supp. at 846; *E.E.O.C. v. Kallin, Phillips, Ross, Inc.*, 420 F.Supp. 919 (S.D. N.Y. 1976), aff'd. 559 F. 2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

There also seems to be some question as to the quality of plaintiff's work. Evidence at trial indicated defendant's dissatisfaction with the quality of plaintiffs work. Furthermore, defendant states in its response that plaintiff improperly delegated responsibilities, had trouble making decisions on his own, failed to visit some theatres in his district and visited others infrequently. Ordering plaintiff back to his former position with Plitt Theatres would not be a productive solution given defendant's dissatisfaction with the quality of plaintiff's work.

Additionally, evidence indicates that at the time of plaintiff's discharge, defendant was undergoing a program of retrenchment due to poor economic conditions in the movie industry. The position of operations manager was eliminated entirely. Furthermore, no new district manager was hired to replace plaintiff. Plaintiff's duties as district manager were assumed by the remaining district managers. Defendant did create the new position of district manager-in-training. Defendant, however, does not anticipate any promotion of the district manager-in-training to full district manager. Defendant's poor economic situation has continued to the present, and therefore, the workforce has remained constant since 1982. Reinstatement under these circumstances would place an undue burden

on defendant. Therefore, for the reasons stated above, this court denies plaintiff reinstatement.

B. Front Pay

Plaintiff alternatively seeks damages in lieu of reinstatement or "front pay." Front pay is an award of the money which plaintiff would have earned from the defendant had reinstatement been ordered. Eglit, *Age Discrimination*, vol.2, ch. 18, § 18.13 at 53 (1983). The defendant contests the availability of such damages.

At this writing, the Seventh Circuit has not ruled on the issue of front pay. In other Circuits, the awarding of front pay has been highly controversial. Courts confronted with the issue of front pay have reached different conclusions. Those courts which have rejected claims for front pay have done so for many reasons. In *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 103 S.Ct. 131 (1982), the court denied damages in lieu of reinstatement because of their speculative nature. Because front pay looks to future earnings, the court held it could not be predicted with certainty. Indeed if a plaintiff were reinstated, he or she might at some point in the future be promoted, or terminated or demoted for a legitimate business reasons completely unrelated to his or her age. Alternatively, the plaintiff could be promoted, terminated, or demoted from the job he or she obtained in mitigation.

Additional reasons for denying front pay were stated in *Ginsberg v. Burlington Industries, Inc.*, 500 F.Supp. 696, 700 (D.C. N.Y. 1980). The *Ginsberg* court denied front pay principally because it was not expressly authorized by the ADEA. The *Ginsberg* court also feared that an award of front pay could undermine the hope that aggrieved employees will compromise before trial.

Finally, the court in *Loeb v. Textron*, 600 F.2d 1003, 1023 (1st Cir. 1979), denied such an award noting that,

" . . . payments in lieu of reinstatement are payments for services not rendered." The court viewed as unjust a plaintiff's receiving compensation for work he or she did not perform.

This court finds the arguments against awarding front pay generally unpersuasive. The ADEA's primary purpose is that of ending age discrimination in employment. Where such discrimination does occur, however, the Act's secondary purpose is to fully compensate victims of such discrimnation. *Merkel v. Scovill, Inc.*, 570 F.Supp. 141, 144 (S.D. Ohio 1983). The "makewhole" standard of relief is the very foundation upon which the remedial provisions of the ADEA were created. Although a front pay award is of a speculative nature, courts are not without experience in assessing damages for future loss of earnings. Personal injury and wrongful death cases provide ready examples. *Koyen v. Consolidated Edison Co. of N.Y.*, 560 F.Supp. 1161, 1168 (S.D. N.Y. 1983).

While the court recognizes the wisdom of allowing a plaintiff to recover "front pay" in an appropriate case, the court declines to exercise its discretion in favor of awarding such damages here. While the court does not agree that an award of front pay is too speculative in all cases, the court does agree that such an award is too speculative here. In the present case, the parties have failed to introduce any evidence concerning an appropriate discount rate for reducing plaintiff's alleged loss of future wages to present cash value. Moreover, the parties did not specifically address the issue of whether the plaintiff intended to work, or was physically capable of working, until his full retirement age. In the absence of such evidence, the court declines to speculate as to the proper amount of such damages.

In the view of this court, the better method for seeking "front pay" would have been to submit the issue to the jury. While the decision of whether to *award* such damages rests

with the court, the determination of the *amount* of such damages is better left to the jury. This is particularly so where, as here, the jury was already asked to determine the amount of unallocated commissions and/or bonuses due the plaintiff.

In addition, until his post trial petition, the plaintiff was somewhat ambiguous about his intention to seek front pay. The plaintiff's complaint did not specifically seek to recover front pay. The complaint merely made reference to "lost wages." Moreover, the plaintiff's pre-trial submissions did not indicate that he was seeking front pay. The stipulation upon which plaintiff's front pay calculations are based is merely entitled "STIPULATION AS TO AMOUNT OF *BACKPAY* AND BENEFITS." (Emphasis added). Finally, the plaintiff failed to bring the issue of front pay to the attention of the court when he was discussing the need to have the jury resolve the dispute concerning commissions and bonuses. While the court's decision not to award front pay is based upon the speculative nature of those damages in the present case, the court is nonetheless concerned with the equity of imposing additional costs on the defendant and judicial system in order to resolve an issue which the plaintiff failed to raise in a timely fashion.

C. Backpay

Section 626(b) of the ADEA entitles a wrongfully discharged employee to receive "amounts owing" to him or her as a result of the employer's violation of the Act. The measure of "amounts owing" or "backpay" under the ADEA is the amount of money the plaintiff would have earned but for the violation, less the income obtained by plaintiff from other employment or amounts earnable with reasonable diligence. *Buchholz v. Symons Mfg. Co.*, 445 F.Supp. 706, 712 (E.D. Wisc. 1978). The back pay award begins accruing from the date of plaintiff's discharge, and ends on the date

judgment is entered on the verdict.[5] *Merkel v. Scovill, Inc.*, 570 F.Supp. 141, 145 (S.D. Ohio 1983). The back pay award includes pecuniary or economic loss such as wages, commission income predicted with reasonable certainty, fringe and other job-related benefits. Plaintiff seeks $59,950 gross lost base salary plus $2,473.30 gross lost nonwage benefits plus $9,600.00 unallocated lost commission and bonuses (as per the jury's verdict) less $34,603.20 earned by plaintiff in mitigation. Defendant does not dispute its liability for the aforesaid amounts. The only issue is whether or not to subtract the unemployment compensation received by plaintiff from the back pay award. The decision of whether to reduce the backpay award by the amount of unemployment compensation is a matter within the court's discretion. *E.E.O.C. v. United Airlines*, 575 F.Supp. 309, 311 (N.D. Ill. 1983); *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 161 (7th Cir. 1981); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 756 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983).

Case law is split on whether to deduct unemployment compensation. Some courts have refused to offset unemployment benefits received on the basis that such benefits are collateral to backpay and are awarded by the state in furtherance of a separate state policy. *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 624 (10th Cir. 1980); *Marshall v. Goodyear Tire*, 554 F.2d 730, 736 (5th Cir. 1977). These cases rely on the collateral source rule set forth in *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361 (1951). In *Gullett*, the Supreme Court stated,

> To decline to deduct state unemployment compensation benefits in computing back pay is not to

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[5] Plaintiff seeks to extend the accrual period beyond the date judgment was entered on the verdict by requesting compensation per diem after March 31, 1984. In view of this court's decision to disallow "front pay," however, damages will not be allowed beyond the March 31, 1984 judgment date.

> make the employees more than whole. . . . Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

Id. at 364.

While there is some authority to the contrary, *E.E.O.C. v. Enterprise Ass'n. Steamfitters*, 542 F.2d 579 (2nd Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), this court is persuaded that the collateral source rule provides the better rule. Thus, the court is unwilling to exercise its discretion to deduct the collateral unemployment benefits received by the plaintiff from the backpay award.

D. Liquidated Damages

Section 626(b) of the ADEA allows prevailing plaintiffs to recover liquidated damages for willful violations. Plaintiff is entitled to liquidated damages in the case at bar because of the jury's determination that the defendant committed a willful violaton of the ADEA. An award of liquidated damages essentially doubles plaintiff's recovery of backpay and withheld benefits.

Defendant states that plaintiff's damage award should be reduced because of defendants good faith. Defendant relies on *Hayes v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976) and *Betrand v. Orkin Exterminating Co.*, 454 F.Supp. 78 (N.D. Ill. 1978) for the proposition that a court has the discretion not to award liquidated damages upon a finding of a willful violation where it has also found good faith on the part of the employer. This court finds defendant's argument wholly unconvincing. The good faith defense was set forth in the Portal-to-Portal Pay Act ("PPA") of 1947 § 11, 29 U.S.C. § 260 as an amendment to the FLSA. The good faith defense is not available in ADEA cases. The Supreme Court stated in *Lorillard v. Pons*, 434 U.S. 575, 582 n.8 (1978), "[a]lthough § 7(e) of the ADEA,

29 U.S.C. § 626(e) expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act, 29 U.S.C. §§ 255 and 259 (1970 ed. and Supp. V), the ADEA does not make any reference to § 11, 19 U.S.C. § 260 (1970 ed., Supp. V)." The selectivity that Congress exhibited in incorporating only certain provisions into the ADEA is strong evidence that Congress did not intend to graft § 11, 29 U.S.C. § 260 onto the ADEA. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979); *Lorillard*, 434 U.S. at 582.

Additionally, a findng of a willful violation would seemingly preclude a finding of good faith. *Loeb*, 600 F.2d at 1020. As the court in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 982 (9th Cir. 1981) stated, "[t]here would be little purpose in allowing an employer who has willfully violated the ADEA to show that it nevertheless acted in 'good faith'. Indeed, it is hard to imagine a situation where a court could find a willful violation to still be in good faith." Thus, this court holds that the good faith defense is not available in ADEA cases, and plaintiff is thereby entitled to a full liquidated damage recovery.

The remaining question is the amount plaintiff should receive as liquidated damages. The proper measure of liquidated damages is the amount of backpay and benefits denied plaintiff by the employer. *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 154 (7th Cir. 1981). Plaintiff claims that liquidated damages should be computed prior to a reduction of the backpay award for mitigation. This court agrees with plaintiff.

The purpose of a liquidated damage award is to compensate employees for "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Betrand v. Orkin Exterminating Co.*, 454 F.Supp. 78, 82 (N.D. Ill. 1978); *Buchholz v. Symmons Mfg. Co.*, 445 F.Supp. 706, 713 (D.C. Wisc. 1978); *Gibson v. Mohawk*, 695 F.2d 1093, 1102 (8th Cir. 1982); *Merkel v. Scovill, Inc.*,

570 F.Supp. 141, 148 (S.D. Ohio 1983). The court in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981) stated, "... the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA." A liquidated damage award is designed to provide non-pecuniary relief, or relief wholly unrelated to wages or economic compensation. *Gibson*, 695 F.2d at 1102. Therefore, it would be unfair to reduce this amount simply because of plaintiff's success at mitigation.

This court is aware of only two cases which have specifically addressed the issue of computation of liquidated damages prior to a reduction of the backpay award for mitigation. In *E.E.O.C. v. United Airlines, Inc.*, 575 F.Supp. 309, 311 (N.D. Ill. 1983), the court held that the amount of liquidated damages should be calculated before the amount of the backpay award is reduced by the amount of pension benefits received. The *United Airlines* court, 575 F.Supp. at 312, quoted from Magistrate Goodstein's discussion of a similar matter in *Orzel v. City of Wauwatosa Fire Department*, No. C 79 C 444 (E.D. Wis. August 31, 1981), *aff'd.*, 697 F.2d 743, 760 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983), "To rule otherwise (and permit the reduction of the backpay award prior to the calculation of the liquidated damages thus necessarily resulting in a reduction of the liquidated damages amount) would unfairly penalize plaintiff who was under a duty to mitigate."

Defendant contends that the statutory language of the ADEA allows for a doubling of *amounts owing* in cases of willful violations. Defendant states that in *Buchholz v. Symons Mfg. Co.*, 445 F.Supp. 706 (D.C. Wisc. 1978), the court computed the amount of liquidated damages only after the backpay award was offset by the mitigation. In *Buchholz*, however, the computation was not contested by the parties. Thus, the *Buchholz* court did not address the specific issue addressed by the court in *United Airlines* and

this court in the present case. For the reasons set forth herein, this court holds that the liquidated damage award should be computed prior to a reduction of the backpay award for mitigation.

E. Prejudgment Interest

A court has the discretion to award a prevailing plaintiff prejudgment interest. *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 162 (7th Cir. 1981). Prejudgment interest is designed to compensate the prevailing plaintiff for the loss of the use of his or her money during the period that such money was withheld. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 982 (9th Cir. 1981). Prejudgment interest merely protects the value of authorized backpay pending trial. *Kelly*, 640 F.2d at 983, n.13.

Case law is split on the issue of awarding prejudgment interest. Some courts have awarded prejudgment interest where there has been no award for liquidated damages. *Kelly*, 640 F.2d 974); *Criswell v. Western Airlines, Inc.*, 524 F.Supp. 384 (C.D. Cal. 1981), *aff'd.* 709 F.2d 544 (9th Cir. 1983); *Cline v. Roadway Exp. Inc.*, 689 F.2d 481 (4th Cir. 1982). Other courts have refused to award prejudgment interest because there has been an award for liquidated damages. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1980); *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945). The trend in case law appears to be in keeping with the principle that a prevailing plaintiff is not entitled to recover both prejudgment interest and liquidated damages.

This court agrees with defendant that a recovery of prejudgment interest is precluded by a statutory award of liquidated damages. *Spagnuolo*, 641 FF.2d 1109; *Brooklyn Savings*, 324 U.S. 697. The purpose of a liquidated damage award, like prejudgment interest, is to provide compensation for the more obscure items of damages such as the loss of use of unpaid wages after plaintiff has been

wrongfully discharged. *Buchholz v. Symons Mfg. Co.*, 445 F.Supp. 706, 713 (E.D. Wisc. 1978); *Gibson v. Mohawk*, 695 F.2d 1093, 1102 (8th Cir. 1982). The Supreme Court in a FLSA case, *Brooklyn Savings*, 324 U.S. at 715, held that if a plaintiff was awarded liquidated damages, he or she was not entitled to prejudgment interest. The court stated, "To allow an employee to recover the basic statutory wage and liquidated damages with interest would have the effect of giving an employee double compensation. . . .Allowance of interest on minimum wages and liquidated damages recoverable under § 16(b) tends to produce the undesirable result of allowing interest on interest." Thus, to prevent double recovery, plaintiff is not entitled to prejudgment interest.

III. COURT COSTS AND ATTORNEY FEES

The parties have sought to reserve ruling on court costs and attorney fees pending the outcome of the instant matters. Upon the entry of this order, plaintiff is free to file his bill of costs and petition for attorneys fees in accordance with the time limitations of local rules 45 and 46.

CONCLUSION

For the foregoing reasons, this court hereby awards plaintiff $106,443.40.

ENTER:

STANLEY J. ROSZKOWSKI, Judge

Stanley J. Roszkowski, Judge
United States District Court

Dated: October 3, 1984

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SAM T. COSTON,
Plaintiff,

vs.

PLITT THEATRES, INC.,
Defendant.

No. 83 C 618

ORDER

This action is now before the court on the defendant's motions under Federal Rules of Civil Procedure 50(b), 59(a), 59(b) and on the plaintiff's motion under rules 52(b), 59(e), and 60(a). On the basis of the briefs and for the reasons set out below the court denies the defendant's motions and grants in part and denies in part the plaintiff's motions.

BACKGROUND

In March of 1984, a jury awarded judgment to the plaintiff on his claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (1982) (ADEA). The jury found that the defendants had wilfully violated the ADEA by firing the plaintiff because of his age. In October of the same year the court entered a judgment on the non-jury issues. The thrust of the defendant's motion is a request that the court grant the defendant a judgment not withstanding the verdict of the jury. The defendant also contests certain portions of the court's calculation of damages. The plaintiff, in turn, raises one computation error and reasserts his position with respect to the proper computation of damages.

DISCUSSION

I. Trial Error

The defendant asserts first as grounds for a new trial the plaintiff's mention of EEOC proceedings in violation of the plaintiff's own in limine motion. The plaintiff had moved to exclude any mention of the outcome of the EEOC proceeding from the trial. The plaintiff argued that the jury might draw incorrect inferences from the EEOC's decision not to prosecute the plaintiff's case.

During the argument on the motion attorneys for both parties characterized their objections as not demanding an absolute ban on the mention of the EEOC proceeding, but as precluding allusions to the outcome of that proceeding. The court finally granted the in limine motion but stated that it did not believe that the ruling barred the parties from referring to the EEOC proceeding "in the proper context."

> At trial, the following colloquy ensued:
>
> Mr. Mathless [plaintiff's attorney]: Mr. Klein, at any time prior to Sam Coston filing this lawsuit, did Plitt do an investigation of Sam's job resume and experience?
>
> Mr. Karasik [defendant's attorney]: Your Honor, I must object for the record. It's outside the scope.
>
> Mr. Mathless: We'll go to the credibility, your Honor, I'll tie it all in.
>
> The Court: with the understanding you'll tie it up, otherwise I'll sustain it and strike it. Where are you going with it?
>
> Mr. Mathless: Your Honor, if we go to the side bar I'll explain exactly.
>
> The Court: I don't intend to go to the side bar.
>
> Mr. Mathless: We will show that no such investigation was done; nevertheless, statements were made by Mr. Klein that an investigation was done. Statements were also made by Mr. Klein critical

> of Mr. Coston for having worked for relatives, and we will show that statements that were made to the EEOC about that fact were false.
>
> Mr. Karasik: Your Honor, I object now.
>
> The Court: Sustained.
>
> Mr. Karasik: I move —
>
> The Court: That may be striken and the jury will be instructed to disregard it.
>
> Mr. Mathless: Your honor, at the appropriate time may I make my offer?
>
> The Court: You may, but you came very close to a mistrial on that. Now proceed with your examination.

(Transcript 250). From this colloquy the defendant charges that the jury was left to infer that some sort of quasijudicial proceeding had been held on the matter and that indeed, the EEOC had found in the plaintiff's favor because the plaintiff's counsel brought the matter up.

The defendant hangs its very heavy hat upon a straw. The court cannot believe that a jury of laypersons would draw such a detailed inference from the incantation of the acronym "EEOC." The case that the defendant points out, *Joseph v. Brierton*, 737 F.2d 1244 (7th Cir.1984), does not demand a different outcome.

In *Brierton* the attorney for the defendant state employees secured a ruling from the trial judge that prevented either party from mentioning that the state indemnified its employees. *Brierton*, 739 F.2d at 1246. The state's attorney centered the closing argument, however, on the unfairness of saddling these simple, individual employees with the requested $1.8 million verdict. The closing argument contravened the substance of the order by implying to the jury that the state would not indemnify the defendants when the judge's ruling prevented the plaintiff from even suggesting the truth.

Even presuming that the plaintiff's counsel's remark here was in violation of the ruling, it was by no stretch of the imagination so egregious as the repeated statements in *Brierton*. The court did not see fit to order a mistrial at that time and declines to change its ruling now.

II. Judgment Notwithstanding the Jury Verdict

The defendant's next contention is that the jury verdict was against the manifest weight of the evidence. There were two theories under which the plaintiff's prima facie age discrimination claim could have gone to the jury, by direct or circumstantial evidence, or by the McDonnell-Douglas formula. *Dorsch v. L. B. Foster Co.*, 782 F.2d 1421, 1424 (7th Cir. 1986); *Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). Because the court finds that the jury could have found for the plaintiff on the basis of direct and circumstantial evidence, the court need not consider whether the plaintiff made out a prima facie statistical case under McDonnell-Douglas.

The court recognizes that the jury's verdict may only rest on reasonable evidence and must be more than a mere scintilla of evidence. The plaintiff need not, however, show that age was the sole reason for the firing. The plaintiff need only show that "but for" his age the defendants would not have fired him. *Dorsch*, 782 F.2d at 1424; *Montagne*, 750 F.2d at 1409.

Of course the most direct piece of evidence produced was a statement made at the plaintiff's firing. According to the plaintiff's testimony, at the time Irwen Cohen told the plaintiff that Plitt was firing the plaintiff, Cohen added that "Plitt is going with youth." Although Cohen denied making such a statement, the jury apparently chose to believe the plaintiff and not Cohen.

That Klein–and not Cohen who made the statement–had the final determination to fire the plaintiff is not fatal

to the plaintiff's case. The jury could easily have inferred that the statement was part in parcel with Klein's message of firing.

This statement was not, moreover, the sole item of evidence. The plaintiff introduced other circumstantial evidence including evidence of positive work evaluations and regular raises. The plaintiff also produced evidence that Plitt replaced Costen with a younger less-able employee. Although the court would hesitate to allow the case to have gone to the jury on any one of these items of evidence standing alone, the issue is whether the plaintiff built a prima facie case in total.

The defendant, of course, had its chance to produce evidence to rebut the plaintiff's prima facie case. The defendant introduced evidence that it had been unsatisfied with the plaintiff's performance and that it had gone through a reduction in force.

The burden then fell to the plaintiff to show that the defendant's stated reason was a pretext. In assuming that burden the plaintiff need not show that the defendant's reasons played no part in the firing decision but only that the defendant's stated reasons would not of themselves have precipitated the firing without the added consideration of the plaintiff's age.[1]

The plaintiff put on evidence that both of the defendant's reasons were pretextual. To the defendant's contentions that the plaintiff was unsatisfactory the plaintiff put on the evidence of regular pay raises and satisfactory work reports. To the reason of reduction in work force the plaintiff put on evidence that Plitt had replaced the plaintiff with a younger, less-effective employee. Presuming, as

---

[1] Because the defendants brief in support of its motion for a judgment notwithstanding the jury verdict did not argue the issues of the jury instructions or the special interrogatory, the court will not consider those issues.

the court must, that the jury accepted the plaintiff's evidence the jury had a reasonable basis on which to determine that the defendant's reasons were pretextual.

The jury had reasonable evidence before it to determine that the defendant would not have fired the plaintiff but for the plaintiff's age. Therefore the court declines to find for the defendants not withstanding the jury's verdict.

III. LIQUIDATED DAMAGES

The defendant next contests the award of liquidated damages. Of course to merit liquidated damages the plaintiff had to produce evidence and the jury had to find that the defendant knew that age discrimination was against the law and yet purposely violated the plaintiff's rights. *TransWorld Airlines, Inc. v. Thurston*, ___U.S. ___, 105 S. Ct. 613 (1985). The substance of the defendant's attack on the liquidated damage award is identical to its argument for the judgment notwithstanding the jury verdict. For the same reason that the court declined to grant the motion on the verdict the court will not strike the liquidated damages.

IV. COMPUTATION OF DAMAGES

A. Liquidated Damages

The defendant reasserts its objection to the court's method of computing liquidated damages. Specifically, in its prior order the court doubled the amount of back pay to determine the amount of liquidated damages before it subtracted the plaintiff's earnings in mitigation. The defendant offers no new argument, but cites one new case, *Hazelton v. Kennecot Corp.*, 710 F.2d 76, 77 (2nd Cir. 1983).

The court in *Hazelthorn* recites but does not comment on the district court's subtraction of mitigating earnings before computing liquidated damages. *Id.* To the attenuated extent that this is authority at all the court does not find it persuasive. The court persists in its belief that it would be unfair to reduce the punitive damages against

the defendant because the plaintiff observed his duty to mitigate damages.

B. Unemployment Compensation and Good Faith Defenses

The defendant raises no new arguments and merely directs the court to its prior arguments before the court. The court considered those arguments seriously at that time and finds no reason to reverse itself out of hand. Therefore the court declines to reduce the judgment by the amount of unemployent pay and declines to reduce the liquidated damages in consideration of some good faith defense.

V. PLAINTIFF'S CONTEST OF DAMAGES

A. Clerical Error

The plaintiff points out a computational error in the court's previous order. As the plaintiff correctly asserts, $144,046.60 minus $34,603.20 equals $109,443.40 not $106,443.40 as the court had stated. Therefore the court amends the award under Federal Rule 60(b) to $109,443.40.

B. Back-Pay.

The jury returned its verdict in March of 1984. The court entered its order on October 3, 1984 and awarded back-pay from the date of the plaintiff's lay off to the date of the jury verdict. The plaintiff contends that the award of back-pay should extend to the date of the court's order.

The plaintiff points out in conjunction with his request that the court's award of postjudgment interest began on the date of the October order. Consequently, there is a gap in the award from March to October.

The plaintiff submits *Criswell v. Western Airlines*, 514 F. Supp. 384, 395 (C.D. Cal. 1981), *aff'd on other grounds*, 709 F.2d 544 (9th Cir. 1983), *aff'd*, ___U.S. ___, 105 S. Ct. 2743 (1984) as an example of a court using its equitable

powers to effect complete relief for an injured plaintiff. Of course, the court's equitable powers are discretionary. In its previous order this court declined to extend back-pay to the date of the court's order in part because of the court's belief that the continued employment of the plaintiff was overly speculative. The court persists in that belief. The court therefore declines to amend its order of back-pay but will start the postjudgment interest from the date of the jury's verdict.

C. Front-Pay

The plaintiff again raises its arguments for front-pay. The court persists in its belief that the facts of the present action makes the plaintiff's continued employ too speculative. The court therefore exrcises its discretion not to award front pay in this action.

CONCLUSION

Although this is not the strongest age discrimination claim ever brought to court, there was reasonable evidence by which the jury could determine a purposeful violation of the Act. Therefore the court will not upset the jury verdict in any respect. The bulk of the rest of both parties' motions resurrect issues that the court has already passed upon. With the exception of one clerical error and the extension of postjudgment interest back to the date of the jury verdict, the court declines to change its prior order after reconsideration of the issues. Finally, the court cannot find a response to the plaintiff's motion for attorney's fees and therefore gives the defendant fourteen days to file a response and gives the plaintiff seven days to reply.

ENTER:

STANLEY J. ROSZKOWSKI, Judge

Stanley J. Roszkowski, Judge
United States District Court

Dated: June 3, 1986

No. 87-1249

Supreme Court, U.S.
FILED
FEB 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

RESPONDENT COSTON'S BRIEF IN OPPOSITION TO PLITT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No. 87-1249

In The
Supreme Court of the United States
October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

RESPONDENT COSTON'S BRIEF IN OPPOSITION TO PLITT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Sam T. Coston Responds in Opposition to the Petition of Plitt Theatres, Inc. for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

c.

STATEMENT OF THE CASE (GENERALLY)

This is an age discrimination jury case brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et. seq.* Plaintiff Sam T. Coston was employed by the Defendant Plitt Theatres, Inc. until January 4, 1982. Plitt fired Coston a few days prior to his 59th birthday.

At the close of trial on March 29, 1984, the jury entered a verdict in favor of Coston and made a specific finding that Plitt's violation of the ADEA was willful. On October 3, 1984 the district court awarded Coston double damages based upon Plitt's willful violation. (Pet. App. D at 44a). On June 3, 1986, the district court denied Plitt's post-trial motions which had challenged both the verdict and the award of liquidated damages for a willful violation. (Pet. App. E at 53a-55a).

Plitt then appealed the district court's entry of judgment on the verdict and on willfulness. The Court of Appeals affirmed the district court on those issues. (831 F.2d 1321 at 1325-1328 (7th Cir. 1987); Pet. App. A at 4a-10a).

d.

STATEMENT OF THE CASE (FACTS)

Plitt had seven district managers in the Chicago area. In January 1982, it fired Coston, yet retained younger district managers Pat Burns and Kurt Noack. (831 F.2d at 1324; Pet. App. A at 3a). Coston was then almost age 59, Noack 32, and Burns 26. (Resp. App. A at 1a).

i. Direct evidence of willful discrimination

The Plitt decision to fire Coston was made by executive vice president Harold Klein and carried out by vice president Irwin Cohen. (831 F.2d at 1324; Pet. App. A at 3a). Coston testified at trial that in response to Coston's

inquiry at the firing, Cohen offered the following rationales for firing Coston rather than Burns or Noack: (a) Burns had seniority; (b) Noack was "super"; (c) "we have to go along with youth." (831 F.2d at 1324; Pet. App. A at 3a).

Plitt did not object to Coston's trial testimony about Cohen's admission that Plitt was going with youth. (Tr. 152-5; Resp. App. B at 2b-5b). Nor did Plitt object to the district court's later instruction to the jury that the agency status of Cohen rendered his acts the acts of Plitt (Tr. 336-7, 398; Resp. App. B at 12b-13b, 15b).

ii. Evidence of pretext

Although Burns had been with Plitt since 1970 (starting as an usher, Tr. 89; Resp. App. B at 1b), he had served less time than Coston as a district manager. (831 F.2d at 1326; Pet. App. A at 6a). Coston had also been a district manager since prior to Noack having any position at Plitt. (Tr. 154; Resp. App. B at 4b).

Noack had preceded Coston as district manager of the Water Tower district. (831 F.2d at 1325-6; Pet. App. A at 6a). "[T]here was testimony from several witnesses at trial, including Klein, that the Watertower theater was in poor shape during Noack's tenure there as district manager, a condition that did not recur when Coston took over as district manager there." (831 F.2d at 1326; Pet. App. A at 6a-7a). "It is also undisputed that Coston improved the situation at Water Tower from what it had been during Noack's tenure . . . " (831 F.2d at 1325-6; Pet. App. A at 6a).

iii. The willfulness instruction

At the jury instruction conference, the attorneys and the court discussed an instruction on willfulness. Plitt objected to the giving of any willfulness instruction, as it claimed that Coston had submitted no evidence in support of a willful violation. Plitt did not claim that the proposed willfulness instruction (*i.e.* Coston's proposed instruction

#12, which was ultimately given) misstated the law. Nor did Plitt offer its own proposed instruction with a different definition for willfulness. (Tr. 293-4; Resp. App. B at 10b-11b).

When the district court later instructed the jury on willfulness, it also advised the jurors of Plitt's stipulation that Plitt "was at all times aware of the illegality of age discrimination." (831 F.2d at 1327; Pet. App. A at 8a).

iv. District court review on pretext and willfulness

In reviewing the jury's verdict that Plitt had violated the ADEA, the district court found that the jury had sufficient evidence to find for Coston on the basis of "direct and circumstantial evidence . . . " (Pet. App. E at 53a). The district court noted the evidence that Plitt had discharged Coston in favor of "a younger less-able employee." (Pet. App. E at 54a).

In denying Plitt's attempt to overturn the willfulness portion, the district court did not mention the *Sywock* standard from which the jury instruction had been taken. Rather, the court cited *Thurston*. (Pet. App. E at 55a).

v. Appellate review on pretext and willfulness

In reviewing Plitt's claim that Coston had been fired because of incompetence, the Court of Appeals found "significant, if not overwhelming, evidence that Coston's work was competent and that he was qualified to remain as a district manager." (831 F.2d at 1326; Pet. App. A at 6a). In evaluating the direct evidence of discrimination presented to the jury, the Court of Appeals described Cohen's direct discriminatory remark as "the clinching evidence." (831 F.2d at 1326; Pet. App. A at 7a). The Court of Appeals also found sufficient evidence that any Cohen legitimate explanation was pretextual. (831 F.2d at 1326, Pet. App. A at 7a).

As the Court of Appeals found that there was no error in the jury instruction on willfulness, it did not reach the issue of whether Plitt's failure to object to the instruction's willfulness definition constituted a waiver. (831 F.2d at 1327; Pet. App. A at 9a).

e.

SUMMARY OF ARGUMENT

As to the willfulness instruction:

1. At the jury instruction conference, Plitt limited its objection on willfulness to its (erroneous) claim that no evidence of willfulness had been presented. Plitt did not object to *Sywock's* definition of willfulness. Nor did Plitt submit its own instruction with a different definition. Plitt therefore waived the issue.

2. When this Court decided *Thurston* in January 1985, post-trial motions were still pending in the instant case. Plitt advised the district court of this Court's decision in *Thurston*. Nevertheless, the district court in June 1986 found that any post-trial objection to the jury instruction had been abandoned by Plitt's failure to sufficiently argue those points in its post-trial submissions. Regardless of whether the district court was correct in its finding of abandonment, that finding was itself waived by Plitt's failure to seek review of that finding in the Court of Appeals.

3. Even if Plitt's failure to object were not a complete waiver, Plitt's failure to seek timely relief at the jury instruction conference means that *Thurston* should not be applied retrospectively in the instant case – a dispute between private parties. This Court has traditionally refused to apply decisions such as *Thurston* retrospectively, where to do so would otherwise affect the rights of private parties, unless the complaining party seeks timely relief initially from the district court.

4. If the *Sywock* instruction was indeed error, any error was harmless under the facts here. Plitt admitted that

it was aware of the illegality of age discrimination (as opposed to merely admitting that the ADEA applied or was 'in the picture'). The evidence of Cohen's discriminatory admission shows that Plitt knew age to be a determining factor in Coston's discharge. As Plitt thus knew its acts to be illegal, the evidence here satisfies either a *Thurston* or *Syvock* standard.

5. When the district judge reviewed Plitt's post-trial motion on willfulness, he applied a *Thurston* standard and found that the jury verdict was supported by ample evidence. This finding cannot be reversed absent an abuse of discretion. To review that finding would require this Court to re-weigh evidence already evaluated by the jury and judge who observed the trial.

6. Cases applying *Syvock* in the Seventh Circuit show that its use has not diluted the two-tier examination prescribed by *Thurston*. Rather, those cases show that under *Syvock*, liquidated damages are not awarded automatically. As nothing in *Thurston* precludes the willfulness definition set forth in *Syvock*, there was no error here.

As to whether a reduction in force can be considered pretextual in an ADEA case:

7. The employment decision here was not Plitt's decision to conduct a reduction in force, but rather its selection of Coston (as opposed to a younger district manager) to be the victim of that reduction in force. Plitt has thus mischaracterized the issue, as neither the jury nor the court adjudicated whether the reduction in force itself was pretextual.

8. Although Coston admitted that a reduction in force was warranted, his admission did not go to the issue of whether such a retrenchment was warranted among the district managers. Instead, Coston put in evidence that shortly after his firing, Plitt created the position of district manager in training, and that Plitt filled that position with a younger, less capable employee. The jury thus had ample

evidence to conclude that applying the reduction in force to the district manager category was a pretext to get rid of an older district manager.

f.

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE WILLFULNESS INSTRUCTION

A.

A Grant Of Certiorari Would Not Change The Outcome, As Plitt Waived Its Challenge To The Willfulness Instruction By Failing To Offer A Specific Objection To That Instruction.

Nothing short of misleading is Plitt's averment (Pet. at 8) that it objected to the trial judge that a *Syvock* instruction equated willfulness with mere negligence and that Plitt's mere knowledge of the ADEA would not amount to a willful discharge. Plitt's petition does not cite to the trial transcript, because Plitt made no such objection.

Rather, as shown by the trial transcript, Plitt's only objection was limited to Plitt's (erroneous) assertion that Coston had submitted no evidence in support of a willful violation. (Tr. 293-4; Resp. App. B at 10b-11b).

[Under Supreme Court Rule 21.5, Plitt's presentation in its Petition of such a material inaccuracy is sufficient reason in and of itself to deny certiorari here.]

Plitt's failure to timely and specifically object to the jury instruction as being a correct definition of willfulness waives any error. See FRCP 51; *Palmer v. Hoffman*, 318 U.S. 109 at 119-20 (1943). A party's blanket objection to the giving of any instruction on a certain issue is insufficient to preserve an objection to the language of the instruction given. *Williamson v. Handy Button Machine*

Company, 817 F.2d 1290 at 1295-6 (7th Cir. 1987). Nor does the doctrine of "plain error" protect parties from failure to object in civil cases. *Id.* at 1295.

Despite the law on waiver set forth above, the Court of Appeals here did not reach the issue of whether Plitt waived its right to appeal the *Syvock* instruction. (831 F.2d at 1327; Pet. App. A at 9a). Plitt may offer the fact that the court in *Rengers v. WCLR Radio Station*, 825 F.2d 160 (7th Cir. 1987) found no waiver in a similar situation. Among other things, the *Rengers* court based its finding on the fact that *Syvock* was the law of the circuit at the time of the trial; *Thurston* had not yet been decided; and the "increased frequency with which parties have been sanctioned for challenging legal standards that are well established in a Circuit . . . " *Id.* at 165.

But one must question the reasoning of *Rengers* on the waiver issue. Coston is aware of no instance of any trial court anywhere penalizing a party for informing the court that he is offering an objection to an established view for the purpose of preserving his right to later seek review from higher authority under FRCP 51. Moreover, under the facts here, Plitt had the opportunity to timely and specifically seek a *Thurston*-type instruction if it so desired:

1. The Second Circuit in *Thurston* had approved the reckless disregard willfulness standard seven months prior to the March 1984 Coston-Plitt trial. See *Air Line Pilots Association International [Thurston] v. Trans World Airlines*, 713 F.2d 940 at 956 (2nd Cir. 1983);

2. This Court granted certiorari in *Thurston* prior to the trial here. See *Trans World Airlines v. Thurston*, 465 U.S. 1065 (1984).

Further, as Plitt notes (Pet. at 3), *Thurston* was decided while this case was still at the post-trial motion stage. The district judge therefore had the discretion to deny any Plitt post-trial attack on the willfulness instruction, in light of the fact that Plitt had pre-trial constructive

notice that the willfulness definition issue was pending before the Supreme Court. Where a party forgos at trial a legal argument which is pending before the Supreme Court in a similar case, and it later attempts after trial to reinstate that argument following a favorable Supreme Court ruling, the district court may deny that attempt at reinstatement. See *DelRio Distributing v. Adolph Coors Co.*, 589 F.2d 176 at 178-9 (5th Cir. 1979), cert. den'd 444 U.S. 840 (1979).

If this Court were to grant certiorari on the willfulness instruction, a likelihood exists that this Court would either find that Plitt waived its objection under FRCP 51 or that a remand is necessary to the Court of Appeals on the issue of waiver. Therefore this case is not a good candidate for certiorari.

B.

Second Waiver On Jury Instruction: The District Judge Found In A Post-*Thurston* Order That Plitt Had Abandoned The Issue Of The Jury Instructions By Failing To Sufficiently Argue Those Instructions In Its Post-Trial Submissions. Even If The District Judge's Finding Of Abandonment Was Erroneous, Plitt Waived Any Attack On That Finding By Ignoring The Finding In Plitt's Brief To The Seventh Circuit.

This Court decided *Thurston* in January 1985. Plitt correctly notes that the instant case was still on post-trial motions rather than on appeal. (Pet. at 3).

Plitt's post-trial motion was not denied until June 1986 – almost one and a half years after *Thurston*. (See Pet. App. E, at 50a-57a). Indeed (as noted in Plitt's brief to the Seventh Circuit) while the post-trial motions were pending, Plitt cited the new *Thurston* decision to the district court. (Plitt 7th Cir. brief at 19; Resp. App. C at 2c-3c).

Plitt's *Thurston*-based appeal to the Seventh Circuit was in part premised upon the district court's refusal

"to set aside the jury's verdict after being advised of the Supreme Court's most recent pronouncement on the issue." (Plitt 7th Cir. brief at 19; Resp. App. C at 2c). However, on the issue of the jury instructions, the district judge had ruled as follows:

> "Because the defendants brief in support of its motion for a judgment notwithstanding the jury verdict did not argue the issues of the jury instructions or the special interrogatory, the court will not consider those issues." (Pet. App. E at 54a, n.1).

The district judge thus found that despite the fact that *Thurston* had been decided 1-1/2 years earlier, Plitt still had not sufficiently argued the jury instruction issue in post-trial submissions, and that Plitt had therefore abandoned that issue.

Had Plitt offered a specific objection at the jury instruction conference, then it would not have been required to repeat that objection in its post-trial motion. 6A *Moore's Federal Practice*, ¶59.14 at 59-304, 59-305 (1982). Plitt's position is that it did not become aware of any *Thurston*-based objection until the case was on post-trial motions. But if a party becomes aware of an objection only after the verdict and before resolution of post-trial motions, then it waives the objection unless it sufficiently argues the point in post-trial motions. See generally, 6A *Moore's Federal Practice* ¶59.14 at 59-306 (1982) (regarding requirement of post-trial motion on certain limited issues which call for district court to exercise discretion). The district judge would be the best one to evaluate whether a *Thurston* instruction would have changed the outcome, as "the trial court occupies the best vantage from which to estimate the prejudicial impact of the error on the jury." *Cruthirds v. RCI, Inc.*, 624 F.2d 632 at 635 (5th Cir. 1980).

Even if one assumes that the district court abused its discretion in finding that Plitt abandoned the jury

instruction issue through insufficient post-trial submissions, Plitt never attacked that finding on appeal. When Plitt's brief presented its issues for review to the Court of Appeals, Plitt did not mention any issue of 'abandonment by insufficient post-trial submissions.' (See Plitt 7th Cir. brief at 1; Resp. App. C at 1c). In the argument section of Plitt's brief, Plitt omitted any mention of the district judge's finding that Plitt's posttrial submissions had insufficiently addressed the issue of jury instructions. (See Plitt 7th Cir. brief at 19-22; Resp. App. C at 2c-6c).

Plitt's failure to present and argue to the Court of Appeals the district judge's finding of abandonment is itself waiver of any such error, and thus a ratification of the district judge's finding. See *Morrison v. City of Baton Rouge*, 761 F.2d 242 at 244 (5th Cir. 1985). "[E]ven an issue expressly presented for resolution is waived if not developed by argument." *Bonds v. Coca Cola Co.*, 806 F.2d 1324 at 1328 (7th Cir. 1986). Plitt cannot now seek Supreme Court review of the district court's post-trial refusal to overturn the jury instruction, after Plitt failed to seek Seventh Circuit review of the district court's explanation for that refusal.

Regardless of whether Plitt's silence at the jury instruction conference constitutes a waiver, the district judge found that Plitt insufficiently argued *Thurston* in the one and one half years after *Thurston* and prior to the district judge ruling on Plitt's post-trial motion. But even if the district judge erred, Plitt committed a second waiver by failing to seek review of the district court's finding.

A grant of certiorari here would therefore place this Court into a quagmire of factual issues about waiver (twice). There is only a slim chance that this Court could avoid a finding of waiver, avoid a remand to the Court of Appeals on the factual issue of waiver, and eventually get to a legal issue. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*,

268 U.S. 220 at 227 (1925). Certiorari should therefore be denied.

C.

Even If Plitt's Waiver Is Excused, This Is The Type Of Case Where It Would Be Unjust To Apply *Thurston* Retrospectively

Even if there is no waiver here, Plitt's failure to timely object still operates to prevent a retrospective application of *Thurston* to the case at bar. This is a case between two private parties. There is no public institution or governmental body involved. As the retrospective operation of a law may result in manifest injustice to parties "in mere private cases between individuals," courts should "struggle hard" against a retrospective construction which would otherwise affect the rights of those parties. *Bradley v. Richmond School Board*, 416 U.S. 696 at 716-7 (1974).

Certiorari should therefore be denied, as Plitt has failed to make a showing that review by this Court would change the outcome of a private case tried prior to *Thurston*.

D.

Certiorari Should Not Be Granted, As Any Error Was Harmless

Plitt stipulated that it was at all times aware of the illegality of age discrimination (as opposed to merely knowing that the ADEA was in the picture, or that the ADEA applied). (831 F.2d at 1327; Pet. App. A at 8a). If the jurors were convinced from the evidence that Plitt knew that age was a determining factor, then the jurors could automatically (based on the stipulation) conclude that Plitt also knew that it was acting illegally.

Coston's testimony as to Cohen's discriminatory admission ("the clinching evidence", 831 F.2d at 1326; Pet. App. A at 7a) shows that Plitt knew age to be a determining factor.

Nor can Plitt claim that the jury should have ignored Coston's testimony about Cohen's admission. By failing to object to the jury instruction (on agency) that Cohen's comment was the comment of Plitt (Tr. 336-7, 398; Resp. App. B at 12b-13b, 15b), and by failing to object to Coston's testimony (Tr. 152-5; Resp. App. B at 2b-5b), Plitt waived any arguments that the jury should not have bound Plitt to Cohen's comment. See Fed. R. Evid. 103(a)(1); FRCP 51; *Palmer v. Hoffman*, 318 U.S. 109 at 119-20 (1943).

Further, rather than emphasizing a (*Syvock* or *Thurston*) two-tier examination, Plitt invited an "all or nothing" result with the following comments in its closing argument to the jury:

> "... First of all, Mr. Cohen flatly denies that he said any such thing. What you have then is the word of one man against another word of another man. And as the Court is going to instruct you in deciding this case, you are going to have to decide it by what is called a preponderence of the evidence. It has to weigh down on the scales in favor of one or the other." (Tr. 382; Resp. App. B at 14b).

Since the jurors concluded that Plitt knew it was acting illegally, it is immaterial whether they even considered that Plitt should have known (*Syvock*) or acted in reckless disregard (*Thurston*). As Coston satisfied an actual knowledge standard which is stricter than *Thurston*, he satisfied both the *Thurston* and *Syvock* standards as well.

The factors unique to this case (Cohen comment, Plitt stipulation, Plitt closing argument) show why even if this Court were to grant certiorari in *WCLR Radio Station v. Rengers*, petition pending in #87-761, certiorari should not be granted here. As there is no evidence that the employer in *Rengers* admitted that it was going with youth (see 825 F.2d 160 (7th Cir. 1987)), the two cases are different in terms of degree of harmless error. (Nor is the employer in *Rengers* saddled with the problem of an unreviewed district

court finding that the jury instruction issue was abandoned by insufficient post-trial submissions.)

Moreover, the jury here found Plitt's explanations to be pretextual (and thus untrue) (831 F.2d at 1326; Pet. App. A at 6a-7a). If Plitt were not aware of its illegal acts, then it would not have contrived pretextual explanations for those acts. Where (a) the employer admits knowledge that the ADEA prohibits using age as a factor in making employment decisions; and (b) the jurors find that the employer intentionally discriminated and that its proffered explanation is pretextual; then the employee is entitled to a willfulness award under the *Thurston* standard. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 at 1099-1101 (11th Cir. 1987).

Cohen's comment shows intentional discrimination. Plitt's offering of a pretextual defense also shows intentional discrimination. When either proof of intentional discrimination is coupled with Plitt's stipulation, the result is a jury finding of Plitt's actual knowledge sufficient to satisfy not only *Syvock* and *Thurston*, but even a stricter standard.

Indeed, when the district judge denied Plitt's post-trial motion on willfulness, he did not mention *Syvock*. Rather, the judge referred to a *Thurston* standard. (Pet. App. E at 55a). The judge who listened to the witnesses thus already provided Plitt what it now seeks – a review under the *Thurston* standard.

Certiorari should not be granted, as any error here was harmless and would not change the outcome. See 28 U.S.C. §2111. The district judge, having superior vantage, reviewed the evidence under a *Thurston* standard. His finding of sufficient evidence to support a *Thurston* willfulness award cannot be overturned absent an abuse of discretion. See *Cruthirds v. RCI, Inc.*, 624 F.2d 632 at 635 (5th Cir. 1980). This Court should not grant certiorari merely to reweigh the same evidence that the district judge reviewed.

E.

Use Of The *Syvock* Standard Is Not Erroneous, As It Preserves The Two-Tier Examination In Both Theory And Practice

There is nothing in *Thurston* which precludes the use of a *Syvock* instruction. In *Thurston*, the Supreme Court disapproved the specific intent willfulness standard utilized in the First Circuit (469 U.S. 111 at 126, n.19), and also disapproved the lesser standard that an act is willful if the employer merely knew of the potential applicability of the ADEA. *Id.* at 127-8. *Thurston* did not comment on the *Syvock* standard or any identical standard.

In approving the Second Circuit's "knew or showed reckless disregard" standard of willfulness, *Thurston* described that standard as "reasonable" and "an acceptable way" of defining willfulness. *Id.* at 126, 128-9. By classifying the Second Circuit standard as *an* acceptable way (rather than *the* acceptable way), *Thurston* thus contemplates that other standards may also be acceptable. See *Golomb v. Prudential Insurance*, 688 F.2d 547 at 552, n.2 (7th Cir. 1982), insofar as differentiating "an" from "the".

Syvock is consistent with *Thurston's* emphasis on preserving a two-tier examination. *Syvock* emphasizes that an award of liquidated damages is not and should not be automatic. *Syvock*, 665 F.2d 149 at 154-156 (7th Cir. 1981).

More importantly, the Seventh Circuit does not merely give lip-service to the two-tier examination. Rather, it applies that examination in practice. In *Syvock* itself, the court refused to award liquidated damages to the prevailing plaintiff. *Id.* at 158. More recently, in *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111 at 117 (7th Cir. 1986), cert. den'd 107 S.C. 1983 (1987), the Seventh Circuit again refused to award liquidated damages to a prevailing plaintiff.

If the two-tier examination in the case at bar appears to Plitt to have been watered down, that appearance results

only from the fact that the evidence here (the combination of Cohen's discriminatory admission, Plitt's stipulation, and Plitt's solicitation of an 'all or nothing' verdict) made the second tier of the examination almost obvious. But not every prevailing plaintiff in the Seventh Circuit will have the evidentiary ammunition carried by Coston here.

Nor is Plitt's reference to alleged juror confusion here (Pet. at 8) worth considering. There is nothing in the record to suggest that Plitt objected to the way the district judge handled the jurors' inquiry. Plitt also omits the fact that the jury withdrew the inquiry (See Plitt 7th Cir. brief at 21, n.*; Resp. App. C at 4c, n.*). Moreover, Plitt did not even raise the juror confusion issue in its post-trial motions. Plitt has therefore waived the issue, as juror confusion is a matter within the district court's discretion. See *DoCarmo v. F. V. Pilgrim*, 612 F.2d 11 at 14-15 (1st Cir. 1979), cert. den'd 446 U.S. 956 (1980). In any event, what a jury *might* be considering when it poses a question is beyond the scope of judicial inquiry. *Id.* at 15; Fed. R. Evid. 606(b).

There thus was no error in the use of a *Syvock* instruction in this case. Certiorari would not change the outcome and therefore should not be granted.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE JURY VERDICT CONCERNING PLITT'S SELECTION OF COSTON, RATHER THAN A YOUNGER DISTRICT MANAGER, TO BE A VICTIM IN THE REDUCTION IN FORCE. THE JURY HAD AMPLE EVIDENCE THAT AGE WAS A DETERMINING FACTOR IN PLITT'S SELECTION OF COSTON.

A.

The Employment Decision Reviewed By The Jury Was Not The Decision To Conduct A Reduction In Force.

Plitt's petition (at 19) erroneously describes the issue here as whether Plitt intended to discriminate in making the decision to conduct a reduction in force. But the issue before the jury was not the wisdom of Plitt choosing to conduct a reduction in force. Rather, the issue (as correctly framed by the Court of Appeals, 831 F.2d at 1325; Pet. App. A at 5a) was whether Plitt allowed age to be a determining factor in selecting Coston, rather than a younger district manager, to be a victim of that reduction in force. In a reduction in force situation, the employer violates the ADEA if it permits age to be a determining factor in deciding who stays and who goes. *Stumph v. Thomas and Skinner, Inc.*, 770 F.2d 93 at 96 (7th Cir. 1985).

The question presented by Plitt to this Court concerning the reduction in force is thus immaterial to the questions decided by the jury, the district court and Court of Appeals below. In deciding whether or not the jury had sufficient evidence that age was a determining factor in Plitt's choice of which district managers would be fired in a reduction in force, there is no burning question of federal law. Although the case is important to Plitt and to Coston, the jury's weighing of evidence here creates no "special and important reasons" for this Court to grant certiorari.

Certiorari is not warranted to merely review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 at 178 (1938), aff'd 305 U.S. 124 (1938).

B.

Plitt's Petition Ignores That Evidence Was Presented Showing That The Plitt Decision To Cut The Number Of District Managers Was Itself A Pretext

Plitt's petition (at 19) correctly notes that Coston admitted that economic conditions warranted a Plitt reduction in personnel generally. However, there is no Coston admission that it was necessary for Plitt to cut the number of district managers.

Rather, there was evidence presented that even the decision to cut district managers was a pretext for discrimination. In Summer 1982, about seven or eight months after Coston was fired, Plitt created the position of district manager in training (Tr. 234; Resp. App. B at 7b). As trainee, Plitt selected an individual who was about 40 or 41 years old at the time of the trial (and thus in his late 30's at the time Coston was fired). (Tr. 232; Resp. App. B at 6b). Plitt admitted that as of the time of trial, with the trainee having been in training for 1-1/2 years already, the trainee still was not ready to be a district manager. (Tr. 239-40; Resp. App. B at 8b-9b).

The jury thus had ample evidence upon which to conclude that Plitt acted pretextually in eliminating the district manager position of 59 year old Coston, only to hire a trainee in his late 30's. The evidence of pretext grows stronger when one compares the "significant, if not overwhelming, evidence" of Coston's competence (831 F.2d at 1326; Pet. App. A at 6a) against the trainee's inability to learn the job in the space of a year and a half.

Indeed, in finding that the jury had ample evidence of pretext on Plitt's defense of reduction in force, the district

judge noted: "To the reason of reduction in work force the plaintiff put on evidence that Plitt had replaced the plaintiff with a younger, less-effective employee. Presuming, as the court must, that the jury accepted the plaintiff's evidence the jury had a reasonable basis on which to determine that the defendant's reasons were pretextual." (Pet. App. E at 54a-55a).

Granting certiorari on the reduction in force issue would bog this Court down with specific fact-finding. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220 at 227 (1925).

g.

CONCLUSION

For each issue submitted by Plitt, Coston has shown multiple reasons why certiorari should not be granted here. Any of those reasons is sufficient for this Court to deny certiorari. Coston therefore requests that the Plitt petition for writ of certiorari be denied.

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APPENDICES

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TO RESPONDENT COSTON'S APPENDIX

APPENDIX A: Plaintiff Coston's Trial Exhibit A (Roster of Plitt District Managers as of January 1, 1982) admitted into evidence at trial and listed as item number 104 on the docketing statement prepared by the Clerk of the United States District Court for the Northern District of Illinois.

APPENDIX B: Excerpts from transcript of trial proceedings had before the Honorable Stanley J. Roszkowski on March 26 through March 28, 1984, which transcript was filed with the district court on November 9, 1984 and listed as item number 72 on the docketing statement prepared by the Clerk of the United States District Court for the Northern District of Illinois.

APPENDIX C: Excerpts from Plitt Brief filed with the United States Court of Appeals for the Seventh Circuit on or about September 22, 1986.

APPENDIX A

PLITT THEATRES, INC. CHICAGO AREA DISTRICT MANAGERS AS OF JANUARY 1, 1982

Name	Age as of 1/1/82	Year Appointed District Manager	Base Salary as of 1/1/82
a) Edward Konradt	64	1975	$26,000
b) Sam Coston	58	1978	28,600
c) Giacomo Cataldo	56	1974	20,280
d) Ralph Sullivan	54	1977	20,000
e) Cosimo Rulli	46	1973	26,000
f) Kurt Noack	32	1979	26,000
g) Pat Burns	26	1981	24,700

Plaintiff's Exhibit A

APPENDIX B

Burns - deposition 89

"Q. Is there anything affecting your health or involving medicine you may be taking that would impair your ability to understand my questions to day?

"A. No.

"Q. If at any time you do not understand a question, please ask me to rephrase it; I will be happy to do so.

Tell us about your education. Did you complete high school?

"A. Yes.

"Q. Did you have any education after high school?

"A. Yes.

"Q. Would you tell us about that, please?

"A. I have got a BA in administration of criminal justice from the University of Illinois.

"Q. Is that the Circle or –

"A. Circle.

"Q. Have you ever had any other post-high school education?

"A. No.

"Q. Have you had any other post-graduate education?

"A. No.

"Q. I apologize for re-asking this, if I asked it before.

When did you start with Plitt?

"A. June the 30th, 1970.

"Q. What was your first position with Plitt?

"A. Usher.

MR. KARASIK: Your Honor, we have gone over this several times now.

THE COURT: Sutained. I think you are going right back over the same territory.

BY MR. MATHLESS:

Q. Did you eventually assume the duties of district manager at the Water Tower after Noack?

A. Yes, I did.

Q. Who appointed you district manager of the Water Tower district?

A. Irwin Cohen.

Q. At the time you were fired in January of 1982, was Kurt Noack fired?

A. No, he was not.

Q. Do you know how old Kurt Noack was at the time you were fired and he was not?

A. Approximately 32.

Q. All right. Mr. Coston, I would like to direct your attention to the day you were fired, January 4, 1982.

From whom did you learn that you were being terminated?

A. From Mr. Cohen.

Q. Where did the conversation take place?

A. In Mr. Cohen's office.

Q. Anybody else present besides you and Mr. Cohen?

A. No, there wasn't.

Q. How long was the discussion?

A. Approximately 20 minutes.

Q. What did Mr. Cohen state to you?

A. He stated to me that business conditions were bad and that the company had to cut expenses.

He said that there would be several positions eliminated within the company and that my position would be terminated, and that Friday, January the 8th, would be my last day.

Q. What was your response?

A. In the beginning I was in kind of a state of shock.

Q. Well, what did you say to Mr. Cohen?

A. I said to him that while I had no argument with the elimination of the operations manager position, why could I not remain as a district manager, which I was, and in place of the two younger district managers, either Pat Burns or Kurt Noack.

Q. What, if anything, did you say about Noack and Burns' seniority?

A. Well, I said that I was senior – I had more seniority than either man and that I should be entitled to it.

Q. What was Cohen's reply to that comment?

A. He said to me Pat Burns had seniority and Kurt Noack was super.

After a few seconds' hesitation, he said to me, "Besides, Sam, we have to go along with youth."

Q. What did you say in response to the comment, "We have to go along with youth"?

A. I said to him, "That is right, Irwin. Kurt is 32 years old, isn't he?"

Q. Did Mr. Cohen reply to your comment about Kurt's being 32 years old?

A. He said, "Yes, he is about that."

Q. Did you discuss any other subjects in your meeting with Mr. Cohen?

A. I asked him if Mr. Harold Klein knew of my firing.

Q. What did Cohen say?

A. Mr. Cohen replied that he did.

I then asked Mr. Cohen if within the entire company of Plitt was there not a position for me.

He said that he had discussed this with Mr. Klein on several occasions and that there were none.

Q. Now in reference to your discussion with Mr. Cohen about seniority, were you a district manager prior to Kurt Noack's becoming a district manager?

A. Yes, I was.

Q. Were you a district manager prior to Kurt Noack even being hired by Plitt?

A. Yes, I was.

MR. KARASIK: Objection, your Honor.

THE COURT: Overruled.

BY MR. MATHLESS:

Q. Were you a district manager prior to Pat Burns becoming a district manager?

A. Yes, I was.

THE COURT: I think this might be a good time to stop for lunch. It's 12:30, and I have a brief matter to take up. It shouldn't take more than 15 or 20 minutes, but I'm not sure of that.

I'm going to ask the jury to come back at 2:15. We will resume immediately after that time as soon as we can. Please remember my previous admonitions.

MR. MATHLESS: Your Honor, do you wish to collect the exhibits at this time?

THE COURT: Yes, I think so.

(At 12:30 o'clock p.m., the within trial was recessed until 2:15 o'clock p.m. of the same day, Tuesday, March 27, 1984.)

of 1981. What was the big movie that failed Christmas of 1981?

A. I believe it was "Reds."

Q. When did the business decline slow down or stop?

A. I ould have to say not until the end of June of 1982, and then there was somewhat of an upswing as a result of just one picture, and that was "E.T." The rest of the summer was not that good with all the other pictures. That one picture helped pull the summer up, but it was not up to expectations.

Q. So, even in June 1982 things were still sluggish, right?

A. Definitely.

Q. Earlier, I believe it was yesterday, we made reference to a district manager in training, Mr. Sadighian, do you recall that?

A. Yes.

Q. He's about 40, 41 years old?

A. Correct.

Q. When was the suggestion first approached of creating the district manager in training position –

MR. KARASIK: Your Honor, that's outside the scope of direct.

THE COURT: Read the question back.

Q. Do you recall the following questions and answers appearing on page 42?

"Question: When was the position of district manager in training created? Answer: I think around August or September of last year."

Mr. Cohen, your deposition was given in 1983, so you're referring to 1982?

A. Correct.

Q. "Question: Did you have any input in creating that position? Answer: No, I think that was a decision that stemmed also from Harold Klein and the projected possible expansion of our circuit."

Do you recall those questions being asked of you and do you recall giving those answers?

MR. KARASIK: Your Honor, I don't think there's anything impeaching about that.

THE COURT: Let him answer. It's cross examination.

THE WITNESS: I think I answered there was possible expansion, some of which occurred, some of which has not occurred. I think I answered the question, sir.

BY MR. MATHLESS:

Q. So, two months after this very bad time starting to level off because of E.T., things are perking up and you're

BY MR. KARASIK:

Q. Have you completed your answer now?

A. Yes.

Q. Mr. Cohen, reference was made to a job title, district manager in training. Is it fair to say that the creation of that job was planning for the future?

A. Yes, it was.

Q. Is Mr. Sadighian the district manager in training at the present time?

A. Yes, he is.

Q. He's still in training?

A. Still in training.

Q. One last question. You mentioned a movie called E.T.?

A. Yes.

Q. Is it correct to say that that was one of the best box office perfoming films in recent history?

A. Yes, it is correct.

MR. KARASIK: I have no further questions, your Honor.

RECROSS EXAMINATION

BY MR. MATHLESS:

Q. How long has it taken you to train Mr. Sadighian?

A. How long is it taking us to train him – an

indefinite period of time. I don't think the man is ready at this point of assuming a district, nor do we have the need for a district manager. Our districts are properly covered with the present personnel, and I cannot justify an addition to my staff at this point in time.

Q. Did you just tell us that Sadighian isn't ready at this time?

A. I said I don't think he's ready for a full-fledged district managership if there were one available, and there's not one available.

Q. So if he's been training for a year and a half and if there were one available, he's not yet ready?

MR. KARASIK: Your Honor, the subject isn't Mr. Sadighian's qualification, that's really far afield, it seems to me.

THE COURT: Let him answer.

THE WITNESS: I would have to say he still needs some additional training. He has spent very little time in training because his primary duties are managing director of Watertower Theaters and when a man is doing something part-time it takes a lot longer to train an individual than if he were at it on a full-time basis.

MR. KARASIK: 12, I don't think there is an iota of evidence on willfulness, Judge, as defined in – in some circuits, they define it as an intentional deliberate discharge, and in others, they say it has to be a reckless kind of thing. But I don't think there's any evidence – in fact, the evidence is to the contrary in letting Mr. Coston go. They felt considerable compassion for him. They gave him severance pay. I don't think there's anything here that would support that finding of willfulness.

MR. MATHLESS: Is Mr. Karasik arguing the case, or instruction?

MR. KARASIK: I'm arguing the applicability of the instruction on the basis of the evidence. That's what we're here for.

MR. MATHLESS: The statement, "We're going with youth," is evidence of willfulness. And the Seventh Circuits have one of the strictest standards among the Circuits.

THE COURT: Why do you offer this at this point in the instructions? That's what I'm asking.

MR. MATHLESS: You mean as opposed to –

THE COURT: Putting it in at the burden of proof instruction. I'm putting it at this stage, it's going to be very confusing to the jury. I think it

will be.

MR. MATHLESS: Well, I put it in at this stage because the issues of liability and damages will already have been taken care of, and then the remaining issue is willfulness. I see no other issues left at that point for the jury to decide, because I suppose you could say whether to double the damages or not should be decided, but I think once they determine the damages, then the Court can do the computation as to doubling as easy as the jury. It's probably more the province of the Court, in light of the fact that the Court will be deciding on how to rule the missing factor.

THE COURT: I see what you're doing. You then added an interrogatory to answer that question. Okay. I think that's a question for argument. And then the other, the interrogatory will take care of that question.

MR. KARASIK: So—

MR. MATHLESS: So, 12 will —

THE COURT: I'm going to give 12 and Plaintiff's Interrogatory No. 1.

MR. KARASIK: Well –

THE COURT: Do you have any objection to Interrogatory No. 1?

go through the other ones quickly and I will show you the ones that I added.

The first three, those are Plaintiff's Instructions 1, 2 and 3.

The next one is Plaintiff's Instruction 6.

The next one is the Court's instruction.

The next one is Plaintiff's Instruction 4,

that is, "In deciding whether any fact has been proved."

The next one is the circumstantial evidence instruction, which I think should be given in almost every case and certain in this case, and that is the Court's instruction.

And the reading of depositions, there was no instruction offered on the reading of depositions. There was a deposition read in this case. I assume you didn't know you were going to read it and that is why you didn't prepare it.

MR. MATHLESS: Found out a day and a half before trial.

THE COURT: And then the "observation, experience in the affairs of life," which is a standard IPI instruction.

The next one is the defendant's instruction, which I modified by striking out all of the language below, and it's just a brief statement of what the case is about.

The next one is a plaintiff's instruction

which relates to the agency which no one has any objection to.

The next two are the ones we just talked about.

The next one is, "If you decide on the defendant on the question of liability, you have no occasion to consider the question of damages." It is right out of IPI.

The next one is modified plaintiff's instruction. That was because of the change, wasn't it?

MR. KARASIK: I didn't have "assess the damages" in there, and that is why you had to put that in.

THE CLERK: The damages on the wages –

THE COURT: There were a lot of other things in there, and we had to modify it to change that.

The next one is the instruction to the jury.

The next two are the verdict forms, then the willfulness instruction, Plaintiff's Instruction No. 12.

Then there is the two special interrogatories. And finally, there is just one that I usually give, so that the jury will know if they want to communicate with the Court.

Okay?

MR. MATHLESS: Yes, your Honor, we would like to complete our record.

THE COURT: All right. Will you please?

grievance about his being fired because of age was months after the fact.

Now, ladies and gentlemen, I would like to briefly review what the plaintiff's evidence was. In all of the testimony that you have heard during these two days of trial, there are really only two points that Mr. Coston can show you on his case as a basis for his claim of age discrimination.

He tells you that Mr. Cohen said to him in that conversation of January 4, 1982, "We will go along with youth." I think those were the exact words that Mr. Coston quoted on the stand yesterday, not "We go with youth; we will go along with youth."

And the second point that Mr. Coston relies upon is that his duties were taken over by some district managers who were younger than he was.

Now let's examine each of those propositions, and I want to show you that each one of them is as thin as a piece of paper. First of all, Mr. Cohen flatly denies that he said any such thing. What you have then is the word of one man against another word of another man. And as the Court is going to instruct you in deciding this case, you are going to have to decide it by what is called a preponderance of the evidence. It has to weigh down on the scales in favor of one or the other.

open court. In considering the evidence in this case, you are not required to set aside your own observation and experience in the affairs of life, but you have a right to consider all of the evidence in the light of your own observation and experience in the affairs of life.

Plaintiff hired in 1978 was employed as a district manager and operations manager for Plitt Theatres. In January 1982 he was discharged from those positions.

Plaintiff claims that his age, 59, was a determinative factor in his discharge.

Defendant denies that the plaintiff's age was a determinative factor in his termination.

Harold Klein and Irwin Cohen were agents of the defendant, Plitt Theatres, Inc., at the time of Sam T. Coston's termination from his employment with Plitt. Therefore, any act of Harold Klein and/or Irwin Cohen at that time was in law the act of the defendant, Plitt Theatres, Inc.

The plaintiff has the burden of proving each of the following propositions:

First, that he was within the age group protected by the age discrimination and employment act, persons between the ages of 40 and 70, at the time he was discharged.

Second, that he was performing his job at a level that met the defendant's legitimate expectations.

Third, that he was nevertheless discharged.

APPENDIX C

ISSUES PRESENTED FOR REVIEW

1. Whether, in an age discrimination in employment case the jury was properly instructed as to the proper standard of a "wilful violation" recently pronounced by the United States Supreme Court and this Circuit?

2. Whether the district court committed prejudicial error in its method of calculating plaintiff's "liquidated damages" pursuant to the pertinent provision of the ADEA?

3. Whether the jury's verdict that age was "*a determining factor*" in plaintiff's discharge was clearly erroneous, contrary to the manifest weight of the total evidence, or, unsupported by substantial evidence?

4. Whether, in the circumstances of the instant case, the award of attorney's fees to plaintiff's counsel was proper?

JURISDICTIONAL SUMMARY

Jurisdiction over the subject matter of the action is claimed to arise under 28 USC, §1331 because the case arises under a law of the United States.

This Court has jurisdiction to review the district court's final order by virtue of 28 USC, §1291.

STATEMENT OF THE CASE

This was an action under the Age Discrimination in Employment Act (hereafter "ADEA"), 29 USC, §621-634 (1976).

ARGUMENT

I.

THE DISTRICT COURT ERRONEOUSLY INSTRUCTED THE JURY AS TO THE PROPER STANDARD FOR A "WILFUL VIOLATION" OF THE ADEA AND REFUSED TO SET ASIDE THE JURY'S VERDICT AFTER BEING ADVISED OF THE SUPREME COURT'S MOST RECENT PRONOUNCEMENT ON THE ISSUE.

Over objection of defendant, at the conference on jury instructions (Tr. 293), Judge Roszkowsky instructed the jury on the issue of wilfulness as follows:

> If you decide for the Plaintiff on the question of liability, you must then decide whether the discrimination by the Defendant was wilful. In order for the discrimination by the Defendant to have been wilful, the Defendant's actions must have been knowing and voluntary and the Defendant either knew or reasonably should have known that its actions were in violation of the law.
>
> Defendant has admitted that it was at all times award of the illegality of age discrimination. Whether these elements of wilfulness have been proved by the evidence is for you to determine. (Tr. 401).

The foregoing instruction was taken from *Syvock* v. *Milwaukee Boiler Mfg. Co., Inc.*, 665 F. 2d 149, 156 (7th Cir. 1981).*

Subsequent to the jury's verdict, defendant moved the district court for leave to file as an additional authority in

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* *Syvock* relied on *Wehr* v. *Burroughs Corp.*, 619 F. 2d 276, 280 (3d Cir. 1980). *Wehr* was not followed by a subsequent Third Circuit District case, *Berndt* v. *Kaiser Alum. & Chem. Sales Inc.*, 694 F. Supp. 962, 966 (ED Pa. 1985) which observed the more "stringent standard of wilfulness" adopted by the U.S. Supreme Court in *TWA* v. *Thurston*, ___ U.S. ___, 105 S. Ct. 613 (1985) discussed infra.

support of its post-trial motion: the decision of the Supreme Court entered on January 8, 1985 in *Trans World Airlines Inc.* v. *Thurston*, ___ U.S. ___, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985). One of the major issues before the high court in *Thurston* was the standard of defining a "wilful violation" of the ADEA. After reciting the legislative history of the Act and its affinity to the Fair Labor Standards Act which also provides for a "wilful violation", the court in *Thurston* said:

> The manner in which FLSA §16(a) has been interpreted therefore is relevant. In general courts have found that an employer is subject to criminal penalties under the FLSA when he 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law.' [citation]. This standard is substantially in accord with the interpretation of 'wilful' adopted by the Court of Appeals in interpreting the liquidated damages provision of the ADEA. The court below stated that a violation of the Act was 'wilful' if 'the employer . . . knew or showed a reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' (713 F. 2d at 956). Given the legislative history of the liquidated damages provisions, *we think the 'reckless disregard' standard is reasonable.* (105 S. Ct. at p. 624). (Emphasis added).

The Supreme Court said that the foregoing definition "is an acceptable way to articulate a definition of 'wilful' " even though the Second Circuit, from which the *Thurston* case was appealed, "misapplied this standard". (*id*)

In language pertinent to the erroneous instruction given by the district judge in the case at bar, the Supreme Court in *Thurston* said at p. 625:

> We are unpersuaded by respondent's [the employee's] argument that a violation of the Act is 'wilful' if the employer simply knew of the potential applicability of the ADEA. Even if the 'in the picture'

> standard were appropriate for the statute of limiations, the same standard should govern a provision dealing with liquidated damages. More importantly, the broad standard proposed by the respondent would result in an award of double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme.

Although the language of the instruction in the case at bar is not simply based upon the "simply knew" test, nevertheless the heart of the instruction is that the defendant "*either knew or reasonably should have known that its actions were in violation of the law.*" That Plitt in the case at bar did in fact know *of* the ADEA, or should have known that its action was in violation of the law, falls far short of the "reckless disregard" standard postulated by the Supreme Court in *Thurston*. The definition given by the district judge was no more than that of mere negligence.

Not only did the instant instruction reflect an incorrect test of wilfulness, it is significant that during its deliberation, the jury sent a written interrogatory to the trial judge:

> Your Honor,
>
> > If age discrimination is found, and the stipulations state that the defendants are aware of the age discrimination statutes, what conditions would justify a finding of "not willful" discrimination?* (Envelope attchd. rec.)

The question reveals the jury's mistaken belief that

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*Judge Roszkowski informed counsel for the parties that the jury sent the interrogatory but did not reveal its contents. He did not respond to the interrogatory. The interrogatory was apparently withdrawn. (Envelope)

because Plitt was aware of the existence of the law prohibiting age discrimination, and that it fired Sam Coston, ergo, Plitt was guilty of a "wilful" violation of the Act. The jury's interrogatory signifies that in effect the jury considered defendant's mere knowledge of ADEA's existence as "in the picture", and equivalent to "wilfulness" in its discharge of plaintiff.

As recently as March 1986 this Court applied the ruling in *Trans World Airlines* v. *Thurston*, supra, in the context of a FLSA case. (*Walton* v. *United Consumers Club, Inc.*, 786 F. 2d 303 (7th Cir. 1986)). The court in *Walton* reversed and remanded to the district court for determination as to whether the employer had wilfully violated the Act. Citing *Trans World Airlines* v. *Thurston*, supra, this Court in *Walton* noted (at p. 308):

> Almost all of the cases construing these statutes [FLSA and ADEA] predate Trans World Airlines, Inc. v. Thurston [citation]. *Thurston* dealt with the interaction of the Fair Labor Standards Act with the Age Discrimination In Employment Act.... Under the ADEA damages are doubled 'only in cases of wilful violations'....The Court held in *Thurston* that 'wilful' means 'reckless disregard' for the law 'and an indifference to its requirements'. [citation]... Wilfulness is a weasel word; see American Nurses Assn. v. Illinois, 783 F. 2d 716, 726 (7th Cir. 1986), denoting a range of culpability from gross negligence to actual knowledge plus malice, depending on the context. *Usually it denotes some highly culpable mental state either actual knowledge that one's acts violate the law, or reckless indifference to the law.* (Emphasis added).

The court in *Walton*, in language pertinent to the case at bar said (p. 311):

> We therefore agree with the courts that have held that 'wilful' means the same thing throughout the ADEA and FLSA. [citation] *Thurston* supplies one definition of 'wilful' for both.

The challenged instruction in the case at bar was based upon the holding in *Syvock* v. *Milwaukee Boiler Mfg. Co., Inc.*, 665 F. 2d 149, 156 (7th Cir. 1981). The court's ruling in *Walton*, supra is an implicit overruling of the test in *Syvock* and therefore, the instruction given by Judge Roszkowski was erroneous. This case presents an opportunity for the Court explicitly to overrule *Syvock* in the context of a wilful violation of the ADEA.

II.

THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN ITS METHOD OF CALCULATING PLAINTIFF'S "LIQUIDATED" DAMAGES PURSUANT TO THE ADEA (29 USC §626 (b)).

§626(b) of the ADEA in pertinent part provides:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this Title [Fair Labor Standards Act]: *provided*, that liquidated damages shall be payable only in cases of wilful violations of this chapter.

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1249

In The

Supreme Court of the United States

October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT

ARGUMENT

I.

THE CHARGE THAT PETITIONER WAIVED THE ISSUE OF CORRECTNESS OF THE WILFULNESS INSTRUCTION IS A RED HERRING BECAUSE THE SEVENTH CIRCUIT DECIDED THE ISSUE ON THE PRESUMPTION THAT THERE WAS NO WAIVER.

The Seventh Circuit in the case at bar expressly stated:

> We do not reach the question of whether Plitt waived its right to appeal the issue of whether *Syvock* is sufficient under *Thurston* because we hold that even presuming that it did not waive its right to appeal the question, *see Rengers v. WCLR Radio Station, slip. op. at 9-10 (7th Cir. Aug. 4, 1987); see also General Beverage Sales Co. v. East-Side Winery,* 568 F.2d 1147, 1152 (7th Cir. 1978) (finding no waiver in similar circumstances); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986); *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (per curiam); *Hegger v. Green*, 646 F.2d 22, 26-27 (2d Cir. 1981) (relying on the reasoning of *General Beverage*), there was no error. (Pet. App. A, 9a)

Thus the question of waiver is not material to the instant petition.

Although the Seventh Circuit did not pass on the issue of waiver in the case at bar, it indicated that it did not find a waiver in other cases presenting similar circumstances. If this Court should see fit to grant *certiorari* to review the question of law, the question of waiver could be remanded to the lower court for resolution. The question of waiver simply is not material to the merits of the instant petition.

II.

THE PETITION CONTAINS NO "MATERIAL INACCURACY" AS RESPONDENT IRRESPONSIBLY CHARGES.

Contrary to Respondent, Plitt's Petition for Certiorari does not present a "material inaccuracy" with respect to Petitioner's objection to the trial court's instruction on "wilfulness".

Citing Supreme Court Rule 21.5, Respondent charges:

> Nothing short of misleading is Plitt's averment (Pet. at 8) that it objected to the trial judge that a *Syvock* instruction equated wilfulness with mere negligence, and that Plitt's mere knowledge of the ADEA would not amount to a wilful discharge. Plitt's Petition does not cite to the trial transcript because Plitt made no such objection. (Resp. Br. Opp. to Pet. for Cert. 7).

The quoted passage from page 8 of the Petition does not assert that the phrase "over petitioner's objections" is confined to the conference on jury instructions. While admittedly the phrase may be inappropriate to the meaning intended, it is clear from the record that the objections were made in the trial court not only at the time of the jury conference on instructions, but while the post-trial motion was pending. Hence the trial court had an adequate opportunity to correct the error of giving the *Syvock* instruction, at least to the extent of granting a new trial.

The record shows that in fact Petitioner objected to the *Syvock* type of instructions at several stages in the proceedings:

1. At the conference on jury instructions counsel for Plitt, in opposing the giving of Plaintiff's instruction 12 (*Syvock*), said:

> I don't think there is an iota of evidence on wilfulness, Judge, as defined in – in some circuits they define it as an intentional deliberate discharge, and in others they say it has to be a reckless kind

> of thing. I don't think there's any evidence – in fact the evidence is to the contrary in letting Mr. Coston go. (Tr. 293).

The foregoing objection, sufficiently informed the district judge that other circuits (prior to *Thurston*) were applying a far more stringent criterion of wilfulness than encompassed in the "knew-or-should-have-known" standard in *Syvock*, which was the model of instruction 12 tendered by plaintiff.*

2. Promptly after this Court's decision in *Thurston*, and while Plitt's trial motion was pending and undetermined by the trial court, Plitt cited *Thurston* as an additional authority to the trial judge and argued:

> By implication the Supreme Court has rejected the standard enunciated by the Seventh Circuit in *Syvock* . . . showing that the employer simply 'knew or should have known' not the equivalent of 'reckless disregard'. A mere showing that the employer 'knew' or 'should have known' [is] not the equivalent proof of a 'reckless disregard' of the act. (Def. Mtn. for Leave to File Addnl. Authority Concerning Newly Decided Opinion of U.S. Supreme Court, 2).

The record shows that plaintiff thereafter filed an 11-page response opposing Plitt's suggestion that *Thurston* was applicable and dispositive of the instant case.

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* In one of plaintiff's trial court briefs he asserted:

> In the 7th Circuit, in order to find wilfulness, the jury must find that the defendant either knew or reasonably should have known that its actions were a violation of the law. . . *Syvock* v. *Milwaukee Boiler*, 665 F. 2d 149, at 155-156 (7th Cir. 1981). In the case at bar the *Syvock* instructions on wilfulness was tendered as plaintiff's proposed Jury Instruction No. 12, accepted by the court and tendered to the jury. (Prevailing Plaintiff's Brief in Reply to Defendant's Response to Plaintiff's Petition for Judgment on All Issues Subsequent to Jury Verdict, p. 4).

3. Respondent misinterprets the passage quoted from p. 8 of the Petition for Certiorari. The record shows that Petitioner did object to the giving of the *Syvock* instruction, and that the *Syvock* instruction is equivalent to a standard of mere negligence and not of recklessness or any other element of wilfulness posited by *Thurston*. In any event, the passage quoted hardly amounts to a "material inccuracy" as respondent charges in a nitpicking effort to swerve this Court's attention from a pure question of law important enough to warrant the Court's review.

III.

THE ERROR WHICH PETITIONER SEEKS TO REVIEW IN THIS COURT WAS CRITICAL, NOT "HARMLESS".

Respondent argues that "certiorari should not be granted as any error was harmless'. (Resp. Br. 12).

It should be noted that neither the trial judge nor the Seventh Circuit made any finding that the giving of the *Syvock* instruction as opposed to a *Thurston*-type instruction on wilfulness was "harmless error". If the point was regarded as "harmless", such finding expectably would have been made by the Court.

Respondent asserts:

> Plitt stipulated that it was at all times aware of the *illegality* of age discrimination (as opposed to merely knowing that the ADEA was in the picture, or that the ADEA applied) . . . If the jurors were convinced from the evidence that Plitt knew that age was a determining factor, then the jurors could *automatically* (based on the stipulation) conclude that Plitt also knew that it was acting illegally. (Resp. Br. 12). (Emphasis added).

Plitt's stipulation that it was awa e of the illegality of age discrimination placed it on no different footing than any other employer who is required to post ADEA notices. Indeed, this Court addressed the identical issue in *Thurston* where it rejected the notion that an employer's

knowledge of the illegality of age discrimination was sufficient to support a finding of wilfulness. This Court said in *Thurston:*

> "More importantly, the broad standard proposed by the Respondent would result in an award of double damages i*in almost every case.* As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme." 105 S. Ct. at 625). (Emphasis added)

Respondent persists in the serious error that an employer's knowledge of the existence of the ADEA (which implies "illegality" of age discrimination), "automatically" compels an inference that the discharge was *wilful.* If that is so, the two-tiered scheme of liability of the ADEA is obliterated—the very result condemned in *Thurston.*

As to Respondent's assertion that the alleged discriminatory admission was made by Irwin Cohen (who was not the decision maker) – that point was adequately addressed in the *PETITION FOR CERTIORARI* (ftnt 3, pp. 7-8) and need not be repeated here.

CONCLUSION

For all of the foregoing reasons and those contained in the Petition, petitioner respectfully prays that this PETITION FOR WRIT OF CERTIORARI be granted.

Respectfully submitted,

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